No. 14-1373

Title:	Utah, Petitioner
	v.
	Edward Joseph Strieff, Jr.
Docketed:	May 19, 2015
Linked with 14A1025	
Lower Ct:	Supreme Court of Utah
Case Nos.:	(20120854)
Decision Date:	January 16, 2015

Questions Presented

---Date---	------Proceedings and Orders----------
Mar 31 2015	Application (14A1025) to extend the time to file a petition for a writ of certiorari from April 16, 2015 to May 18, 2015, submitted to Justice Sotomayor.
Apr 6 2015	Application (14A1025) granted by Justice Sotomayor extending the time to file until May 18, 2015.
May 15 2015	Petition for a writ of certiorari filed. (Response due June 18, 2015)
Jun 11 2015	Order extending time to file response to petition to and including July 20, 2015.
Jun 18 2015	Brief amici curiae of Michigan, and Ten Other States filed.
Jun 30 2015	Brief of respondent Edward Joseph Strieff, Jr. in opposition filed.
Jul 14 2015	Reply of petitioner Utah filed. (Distributed)
Jul 15 2015	DISTRIBUTED for Conference of September 28, 2015.
Oct 1 2015	Petition GRANTED.
Nov 6 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 4, 2015.
Nov 6 2015	The time to file respondent's brief on the merits is extended to and including January 22, 2016.
Nov 6 2015	Petitioner will file a reply brief on the merits on or before February 9, 2016.
Dec 4 2015	Brief of petitioner Utah filed.
Dec 4 2015	Joint appendix filed. (Statement of costs filed)
Dec 11 2015	Brief amicus curiae of the United States filed.
Dec 11 2015	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Dec 11 2015	Brief amici curiae of Michigan, and Twenty-Nine Other States filed.
Dec 23 2015	SET FOR ARGUMENT on Monday, February 22, 2016.
Jan 4 2016	Record requested from the Supreme Court of Utah.
Jan 12 2016	Record received from the Supreme Court of Utah, the record is electronic.
Jan 15 2016	CIRCULATED
Jan 21 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 22 2016	Brief of respondent Edward Joseph Strieff, Jr. filed. (Distributed)

Jan 29 2016	Brief amici curiae of Electronic Privacy Information Center (EPIC), and Twenty-One Technical Experts and Legal Scholars filed. (Distributed)
Jan 29 2016	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Jan 29 2016	Brief amici curiae of Tracy E. Labrusciano, et al. filed. (Distributed)
Feb 3 2016	Reply of petitioner Utah filed. (Distributed)
Feb 18 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 22 2016	Argued. For petitioner: Tyler R. Green, Solicitor General, Salt Lake City, Utah; and John F. Bash, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Joan C. Watt, Salt Lake City, Utah.

Supreme Court, U.S.
FILED
MAY 15 2015
OFFICE OF THE CLERK

14-1373

No. 14-_____

In the
Supreme Court of the United States

STATE OF UTAH,
Petitioner,

vs.

EDWARD JOSEPH STRIEFF, JR.,
Respondent.

On Petition for a Writ of Certiorari
to the Utah Supreme Court

Petition for Writ of Certiorari

SEAN D. REYES
Utah Attorney General
JEFFREY S. GRAY*
Assistant Attorney General
BRIDGET ROMANO
Utah Solicitor General
LAURA DUPAIX
Criminal Appeals Director
Counsel for Petitioner
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180
Email: jgray@utah.gov

**Counsel of Record*

QUESTION PRESENTED

Should evidence seized incident to a lawful arrest on an outstanding warrant be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful?

TABLE OF CONTENTS

Question Presented i
Table of Contents ii
Table of Authorities iv
Opinions Below 1
Jurisdiction 1
Constitutional Provisions Involved 2
Statement of the Case 2
Reasons for Granting the Petition 6
A. Courts are deeply divided over whether and how the attenuation doctrine applies to the preexisting warrant scenario. 8
1. In most jurisdictions, evidence seized incident to a warrant-arrest will not be excluded unless the initial stop was flagrantly unlawful 8
2. In several jurisdictions, evidence seized incident to a warrant-arrest will always be excluded. 12
3. In a few jurisdictions, evidence seized incident to a warrant-arrest will never be excluded. 15
B. The Utah Supreme Court erred in excluding the evidence seized incident to arrest on the preexisting warrant. 17
C. This case is an ideal vehicle for resolving this important and recurring issue. 25

CONCLUSION 26

APPENDIX

Opinion of the Utah Supreme Court (*State v. Strieff*, 2015 UT 2, 778 Utah Adv. Rep. 48) ..... App. 1

Opinion of the Utah Court of Appeals (*State v. Strieff*, 2012 UT App 245, 286 P.3d 317) ..... App. 37

Trial court's "Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion to Dismiss and Defendant's Motion to Reconsider" ..... App. 99

TABLE OF AUTHORITIES

FEDERAL CASES

Alabama v. White, 496 U.S. 325 (1990)..... 23

Ashcroft v. al-Kidd, 131 S.Ct. 2074 (2011)..... 24

Atkins v. City of Chicago, 631 F.3d 823 (7th Cir. 2011).....16, 17, 18, 26

Brown v. Illinois, 422 U.S. 590 (1975).....*passim*

Davis v. United States, 131 S.Ct. 2419 (2011)..... 6, 8, 19

Herring v. United States, 555 U.S. 135 (2009).....*passim*

Hudson v. Michigan, 547 U.S. 586 (2006)..... 6

Johnson v. Louisiana, 406 U.S. 356 (1972)..... 21

Navarette v. California, 134 S.Ct. 1683 (2014)..... 22, 23

United States v. Ceccolini, 435 U.S 268 (1978)..... 21

United States v. Crews, 445 U.S. 463 (1980)..... 6, 18, 23

United States v. Green, 111 F.3d 515(7th Cir.), *cert. denied*, 522 U.S. 973 (1997) .....*passim*

United States v. Gross, 662 F.3d 393 (6th Cir. 2011)..... 12, 13, 14

United States v. Janis, 428 U.S. 433 (1976) 19

United States v. Leon, 468 U.S. 897 (1984) .....*passim*

United States v. Lopez, 443 F.3d 1280 (10th Cir. 2006) 14

United States v. Luckett, 484 F.2d 89 (9th Cir. 1973) 14

United States v. Simpson, 439 F.3d 490 (8th Cir. 2006) 9, 11, 25

Wong Sun v. United States, 371 U.S. 471 (1975) 7, 18, 25

STATE CASES

Cox v. State, 916 A.2d 311 (Md. 2007) 9

Hardy v. Commonwealth, 149 S.W.3d 433 (Ky. App. 2004) 10

Jacobs v. State, 128 P.3d 1085 (Okla. Crim. App. 2006) 10

McBath v. State, 108 P.3d 241 (Alaska App. 2005) 10, 13

People v. Brendlin, 195 P.3d 1074 (Cal. 2008), *cert. denied*, 556 U.S. 1192 (2009) 9, 11, 20, 24

People v. Mitchell, 824 N.E.2d 642 (Ill. App. 2005) 10, 20

People v. Padgett, 932 P.2d 810 (Colo. 1997) (en banc) 13

People v. Reese, 761 N.W.2d 405 (Mich. App. 2008) 10

Quinn v. State, 792 N.E.2d 597(Ind. App.), *transfer denied*, 804 N.E.2d 753 (Ind. 2003) 10

State v. Bailey, 338 P.3d 702(Or. 2014) (en banc) 7, 10, 18

State v. Cooper, 579 S.E.2d 754(Ga. App. 2003), *cert. denied* (Ga. July 14, 2003) 16

State v. Daniel, 12 S.W.3d 420 (Tenn. 2000) 14

State v. Frierson, 926 So.2d 1139 (Fla.), *cert. denied*, 549 U.S. 1082 (2006) 9, 24

State v. Grayson, 336 S.W.3d 138 (Mo. 2011) 9, 22

State v. Hill, 725 So.2d 1282 (La. 1998 9

State v. Hummons, 253 P.3d 275 (Ariz. 2011) 9, 22

State v. Mazuca, 375 S.W.3d 294 (Tex. Crim. App. 2012), *cert. denied*, 133 S.Ct. 1724 (2013) 10, 22

State v. Moralez, 300 P.3d 1090 (Kan. 2013) 13

State v. Page, 103 P.3d 454 (Ida. 2004) 9

State v. Shaw, 64 A.3d 499 (N.J. 2012) 9, 22, 25

State v. Soto, 179 P.3d 1239 (N.M. App. 2008), *cert. quashed*, 214 P.3d 793 (N.M. 2009) 10

State v. Strieff, 2012 UT App 245, 286 P.3d 317) (App. 37-98) ..... *passim*

State v. Strieff, 2015 UT 2, 778 Utah Adv. Rep. 48 (App. 1-36) ..... *passim*

State v. Thompson, 438 N.W.2d 131 (Neb. 1989) 15

Torres v. State, 341 P.3d 652 (Nev. 2015) 14

FEDERAL STATUTES

28 U.S.C. § 1257 2

U.S. CONST. amend. IV 2

No. 14-____

In the
Supreme Court of the United States

STATE OF UTAH,
Petitioner,

vs.

EDWARD JOSEPH STRIEFF, JR.,
Respondent.

On Petition for a Writ of Certiorari
to the Utah Supreme Court

Petition for a Writ of Certiorari

The State of Utah respectfully petitions for a writ of certiorari to review the judgment of the Utah Supreme Court.

OPINIONS BELOW

The opinion of the Utah Supreme Court is reported at 2015 UT 2, 778 Utah Adv. Rep. 48 (App. 1-36). That court reversed the opinion of the Utah Court of Appeals, which is reported at 2012 UT App 245, 286 P.3d 317 (App. 37-98). The order of the state district court in which the question presented was first decided is not published (App. 99-103).

JURISDICTION

The judgment of the Utah Supreme Court was entered on January 16, 2015. On April 6, 2015, an extension was granted to file the petition for a writ

of certiorari to and including May 18, 2015. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. *Factual background.* A warrant was issued for respondent Edward Strieff's arrest on a traffic matter and remained outstanding until narcotics detective Doug Fackrell learned of the warrant during an investigatory stop on December 21, 2006. App. 5; R125:2.

* * *

In December 2006, an anonymous caller left a message on a police drug tip line reporting "narcotics activity" at a South Salt Lake residence. App. 4. To corroborate the tip, Detective Fackrell—an 18-year veteran with specialized training in drug enforcement—conducted intermittent surveillance of the home over the course of a week. App. 4; R125:2-3. He saw some "short term traffic" at the home (visitors would stay and then leave within a few minutes).

App. 4. Although not "terribly frequent," the short term visits were more than that at a typical house and, in the detective's experience, were consistent with drug sales activity. App. 4.

While watching the home on December 21st, Detective Fackrell saw Strieff leave the house—"the same as other people had done that [he'd] been watching"—but he had not seen when Strieff entered the home. App. 4; R125:8. After Strieff walked about a block, Detective Fackrell stopped him in a 7-Eleven parking lot. App. 4, 38.

Detective Fackrell identified himself, explained why he had been watching the house, and asked Strieff what he had been doing there. App. 5. Wanting to know who he was dealing with, the detective also asked Strieff for his identification and ran a warrants check. App. 5; R125:5-6. When dispatch notified Detective Fackrell of Strieff's preexisting warrant, he arrested him. App. 5. In a search of Strieff's person incident to arrest, Detective Fackrell found methamphetamine, a glass drug pipe, and a small plastic scale with white residue. App. 5, 101.

2. *Trial court proceedings.* Strieff was charged with unlawfully possessing methamphetamine and drug paraphernalia. App. 5. He moved to suppress the evidence seized in the search incident to his arrest, arguing that it was fruit of an unlawful investigatory stop. App. 5. The prosecutor conceded that Detective Fackrell was a fact or so shy of reasonable

suspicion to justify an investigatory stop, but argued that exclusion was not appropriate under the attenuation doctrine. App. 5. The district court agreed and denied the motion to suppress and a subsequent motion to reconsider. App. 6, 99-103.

Strieff pleaded guilty to possession of drug paraphernalia and an amended charge of attempted possession of a controlled substance, but reserved the right to appeal the order denying his motions to suppress and reconsider. App. 6.

3. *Intermediate appellate review.* The Utah Court of Appeals affirmed. App. 37-98. Relying on *Brown v. Illinois*, 422 U.S. 590 (1975), the court held that the arrest on "the preexisting warrant was an intervening circumstance that, coupled with the absence of purposefulness and flagrancy on the part of Officer Fackrell in detaining Strieff, sufficiently attenuated" the taint of the unlawful detention. App. 83-84. The court rejected Strieff's claim—espoused by the dissent (App. 84-98)—that because the inevitable discovery doctrine cannot provide relief, the attenuation doctrine cannot do so. *See* App. 43-49.

4. *Utah Supreme Court review.* The Utah Supreme Court granted certiorari and reversed. The court recognized that Strieff was lawfully arrested on the outstanding warrant and lawfully searched incident to that arrest. App. 32. But the court held that the evidence should nonetheless be suppressed because of the prior, unlawful stop. App. 34. The

Utah court conceded that in these circumstances, lower courts have widely treated a warrant-arrest as an intervening event that tends to attenuate the taint of prior illegality. App. 2-3. But the Utah court adopted a minority position—holding that the attenuation doctrine does not apply "at all" to the outstanding warrant scenario, but is instead limited to "intervening circumstances involving a defendant's independent acts of free will (such as a confession and perhaps a consent to search)." App. 25-27, 31.

The state supreme court noted that this Court has never addressed the attenuation doctrine's applicability to the preexisting warrant scenario. App. 2. Left with only "tea leaves," the Utah court identified three reasons for rejecting the doctrine's application in these circumstances. App. 36. First, the court opined that an arrest on a preexisting warrant would not be treated as an "intervening cause" under the tort theory of proximate causation—because the warrant is neither a "subsequent, independent occurrence" nor an "unforeseeable" event. App. 28-29. Second, the court surmised that this Court would not treat such an arrest as an intervening event, because all of this Court's attenuation cases have involved confessions, and the factors relevant in assessing attenuation in confession cases seem "ill-suited to the outstanding warrant scenario." App. 20 & n.4, 29-31. Finally, the court concluded that applying the doctrine in this context would "ultimately swallow the inevitable discovery exception." App. 31-34.

REASONS FOR GRANTING THE PETITION

The question in this case is whether evidence seized incident to a lawful arrest on a preexisting warrant should be suppressed because the warrant was discovered during an investigatory stop later found to have been unlawful. This question involves a longstanding, acknowledged conflict among lower courts over whether, or how, this Court's attenuation doctrine applies under these circumstances.

* * *

Because suppression "exacts a heavy toll on both the judicial system and society at large," *Davis v. United States*, 131 S.Ct. 2419, 2427 (2011), application of the exclusionary rule is the Court's "last resort, not [its] first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). Suppression is appropriate only when the deterrent value of exclusion "outweigh[s] its heavy costs." *Davis*, 131 S.Ct. at 2427 The attenuation doctrine was born of this principal.

Under the attenuation doctrine, evidence acquired as a result of unlawful police conduct is not suppressed if the causal connection "has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint'" of the original illegality. *United States v. Crews*, 445 U.S. 463, 471 (1980). The question, then, is not one of but-for causality alone, but "whether, granting establishment of the primary illegality, the [tainted] evidence . . . has been come at by exploitation of that

illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1975) (quotation marks and citation omitted).

Beginning with *Wong Sun*, this Court has most often addressed the attenuation doctrine in the context of confessions following an illegal arrest. The relevant question in those cases is whether the defendant's decision to talk to the police "was sufficiently an act of free will" to break the causal connection between the illegality and the verbal evidence. *Id.* at 486. In *Brown v. Illinois*, the Court identified three factors necessary to answering that question: the "temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." 422 U.S. 590, 603-04 (1975).

But as the Utah court noted, "a gap of substantial significance" persists in this Court's attenuation jurisprudence. App. 35. This Court has never addressed whether, or how, the attenuation doctrine (and the *Brown* analysis in particular) applies to the preexisting warrant scenario—where, during a presumptively illegal stop, police discover a preexisting warrant, lawfully arrest the subject on that warrant, and seize contraband incident to that arrest. App. 35; *State v. Bailey*, 338 P.3d 702, 709-10 (Or. 2014) (en banc).

The Court's silence has bred widespread disagreement and confusion among the many lower courts that have addressed the issue. Review by the Court is necessary to resolve this intractable conflict on an important and frequently arising issue—and to prevent courts from needlessly "ignor[ing] reliable, trustworthy evidence." *Davis*, 131 S.Ct. at 2427.

A. Courts are deeply divided over whether and how the attenuation doctrine applies to the preexisting warrant scenario.

Although lower courts have grappled with the issue for years, they remain deeply divided—both as to the doctrine's applicability to preexisting warrant cases and as to the contours of its application. Depending on whether they apply the attenuation doctrine, or how they apply the doctrine, lower courts fall into one of three camps: (1) those that exclude the evidence only if the police engaged in flagrant misconduct (the majority); (2) those that always exclude the evidence; and (3) those that never exclude the evidence.

1. In most jurisdictions, evidence seized incident to a warrant-arrest will not be excluded unless the initial stop was flagrantly unlawful.

The Seventh Circuit in *United States v. Green*, 111 F.3d 515, 520-24 (7th Cir.), *cert. denied*, 522 U.S. 973 (1997), held that an arrest on a preexisting warrant is an intervening circumstance that purges the

taint of an unlawful investigatory stop, unless the stop was the product of flagrant police misconduct. *Green* explained that "'[b]ecause the primary purpose of the exclusionary rule is to discourage police misconduct, application of the rule does not serve this deterrent function when the police action, although erroneous, was not undertaken in an effort to benefit the police at the expense of the suspect's protected rights.'" *Id.* at 523 (citation omitted).

The majority of courts to address the issue have adopted *Green's* rationale, including the Eighth Circuit Court of Appeals and 11 state high courts. *See United States v. Simpson*, 439 F.3d 490, 495-96 (8th Cir. 2006) (holding warrant-arrest attenuated taint of nonflagrant, unlawful stop); *State v. Hummons*, 253 P.3d 275, 277-79 (Ariz. 2011) (same); *People v. Brendlin*, 195 P.3d 1074, 1078-81 (Cal. 2008) (same), *cert. denied*, 556 U.S. 1192 (2009); *State v. Frierson*, 926 So.2d 1139, 1143-45 (Fla.) (same), *cert. denied*, 549 U.S. 1082 (2006); *State v. Page*, 103 P.3d 454, 458-60 (Ida. 2004) (same); *State v. Hill*, 725 So.2d 1282, 1283-88 (La. 1998) (same); *Cox v. State*, 916 A.2d 311, 318-24 (Md. 2007) (same); *State v. Grayson*, 336 S.W.3d 138, 148 (Mo. 2011) (en banc) (holding warrant-arrest did not purge taint because stop was nothing more than "fishing expedition" based on hunch "in the hope that something might turn up"); *State v. Shaw*, 64 A.3d 499, 512 (N.J. 2012) (holding warrant-arrest did not purge taint because "random detention of an individual for the purpose of running

a warrant check . . . cannot be squared with values that inhere in the Fourth Amendment"); *Jacobs v. State*, 128 P.3d 1085, 1087-89 (Okla. Crim. App. 2006) (holding warrant-arrest attenuated taint of nonflagrant, unlawful stop); *State v. Bailey*, 338 P.3d 702, 715 (Or. 2014) (en banc) (holding warrant-arrest did not purge taint because "it should have been obvious to the officers that they had extended the detention without regard to defendant's right to be free from an unreasonable seizure"); *State v. Mazuca*, 375 S.W.3d 294, 306-10 (Tex. Crim. App. 2012) (holding warrant-arrest attenuated taint of nonflagrant, unlawful stop), *cert. denied*, 133 S.Ct. 1724 (2013).

Six intermediate state courts also land in this camp. *See McBath v. State*, 108 P.3d 241, 247-50 (Alaska App. 2005) (holding warrant-arrest attenuated taint of nonflagrant, unlawful stop); *People v. Mitchell*, 824 N.E.2d 642, 649-50 (Ill. App. 2005) (holding warrant-arrest did not purge taint because defendant stopped "for no apparent reason other than to run a warrant check"); *Quinn v. State*, 792 N.E.2d 597, 599-603 (Ind. App.), (holding warrant-arrest attenuated taint of nonflagrant, unlawful stop), *transfer denied*, 804 N.E.2d 753 (Ind. 2003); *Hardy v. Commonwealth*, 149 S.W.3d 433, 435-36 (Ky. App. 2004) (same); *People v. Reese*, 761 N.W.2d 405, 413-14 (Mich. App. 2008) (same); *State v. Soto*, 179 P.3d 1239, 1245 (N.M. App. 2008) (holding warrant-arrest did not purge taint because officers stopped defendant based on nothing more than

"vague notion that they would obtain [his] personal information"), *cert. quashed*, 214 P.3d 793 (N.M. 2009). Before its reversal below, Utah's intermediate appellate court also fell in this camp. *See* App. 49-84.

Courts in the *Green* camp treat the warrant-arrest as an intervening circumstance that triggers attenuation analysis. They generally treat *Brown's* temporal proximity factor as having little or no relevance in assessing whether the intervening warrant-arrest was sufficient to purge the taint of illegality. *See, e.g., Simpson*, 439 F.3d at 495 (holding that courts "need not focus on the first *Brown* factor"); *Brendlin*, 195 P.3d at 1080 (holding temporal proximity was "outweighed" by other *Brown* factors). Instead, they focus on *Brown's* flagrancy factor: If the police illegality was flagrant, the evidence is suppressed; but if not, it is admitted. *See* cases cited, *supra*, at 8-10. Their focus on flagrancy aligns perfectly with this Court's precedent that exclusion is warranted only if it "serves to deter deliberate, reckless, or grossly negligent conduct." *Herring v. United States*, 555 U.S. 135, 144 (2009).

Had this case arisen in any of the 19 jurisdictions in this camp, the evidence would not have been excluded. As held by the intermediate appellate court, Detective Fackrell's conduct "amounted to a misjudgment," not "a deliberate or glaring violation of Strieff's constitutional rights or the result of official indifference to them." App. 71-72. The evidence

found on Strieff in the lawful search incident to arrest would therefore be admissible under the *Green* approach. *See* App. 57-84.

2. In several jurisdictions, evidence seized incident to a warrant-arrest will always be excluded.

In contrast, the Sixth Circuit and four state high courts—including the Utah Supreme Court—have treated (or effectively treated) a warrant-arrest as a circumstance that cannot save tainted evidence from exclusion. Three courts apply the attenuation doctrine to preexisting warrant cases, but treat the *Brown* factors in such a way that a warrant-arrest could never result in attenuation. The other two hold that the attenuation doctrine simply does not apply, reasoning that a warrant-arrest is not an intervening event.

The Sixth Circuit in *United States v. Gross*, 662 F.3d 393 (6th Cir. 2011), applied the attenuation doctrine, but refused to adopt the Seventh Circuit's *Green* analysis. *See id.* at 404 (emphasizing its "recent and express pronouncement" that it has "not adopted the Seventh Circuit cases"). The Sixth Circuit found that *Brown's* flagrancy factor was "a wash," weighing neither in favor of nor against exclusion, because the arresting officer in the case could not be charged with knowing that the stop was illegal. *Id.* at 406. Had the case been decided under *Green*, the nonflagrant nature of the stop would have

resulted in attenuation and admission of the evidence. But the Sixth Circuit held otherwise, concluding that the intervening warrant-arrest did "not suffsuffice to break the chain of causation," especially where the evidence was discovered shortly after the defendant's arrest, *id.*—a fact "in essentially every" preexisting warrant case. *McBath*, 108 P.3d at 248.[1]

Thus, unlike the Seventh and Eighth Circuits, an intervening warrant-arrest in the Sixth Circuit carries negligible weight in attenuation analysis—insufficient to purge the taint of even *nonflagrant* police illegality. The supreme courts of Kansas and Colorado have reached similar conclusions.

The Kansas Supreme Court in *State v. Moralez*, 300 P.3d 1090, 1103 (Kan. 2013), held that an intervening warrant-arrest was "essentially . . . neutral"—"neither weighing in favor of nor against suppression." It also treated the short time lapse between the illegality and the arrest as "weigh[ing] heavily in favor of suppression." *Id.* And the Colorado Supreme Court in *People v. Padgett*, 932 P.2d 810, 817 (Colo. 1997) (en banc), treated close temporal proximity as dispositive—holding that the tainted evidence was not attenuated because it was acquired

---

[1] Although the evidence in *Gross* was not found in a search incident to arrest—Gross managed to conceal it—it was found "just a short time" after he was transported to the jail. 662 F.3d at 397, 406.

"in temporal and physical proximity" to an unlawful stop, "without sufficient intervening time and circumstances to carry the prosecution's burden of proof to demonstrate dissipation of the taint."

The high courts in two other states have also foreclosed a finding of attenuation in preexisting warrant cases, but for a different reason—holding that a warrant-arrest does not constitute an intervening event. On this point, the Utah Supreme Court held that the "attenuation doctrine is directed only at intervening circumstances involving a defendant's independent acts of free will." App. 31. Less than two weeks later, the Nevada Supreme Court rejected the doctrine's application for the same reason, holding that the attenuation doctrine did not apply because "there was no demonstration of an act of free will by the defendant to purge the taint." *Torres v. State*, 341 P.3d 652, 658 (Nev. 2015).[2]

---

[2] The Sixth Circuit in *Gross*, 662 F.3d at 404, and the Nevada Supreme Court in *Torres*, 341 P.3d at 658, identified the Ninth and Tenth Circuits and Tennessee as also falling in this camp, citing *United States v. Luckett*, 484 F.2d 89, 90-91 (9th Cir. 1973), *United States v. Lopez*, 443 F.3d 1280, 1286 (10th Cir. 2006), and *State v. Daniel*, 12 S.W.3d 420 (Tenn. 2000). All three cases held that evidence discovered incident to a warrant-arrest following an unlawful stop should be suppressed. Although these cases may be read as rejecting attenuation in all preexisting warrant cases, it does not appear that the attenuation doctrine had been raised in any of them.

3. In a few jurisdictions, evidence seized incident to a warrant-arrest will never be excluded.

The third camp consists of courts that will always admit the evidence discovered in a lawful search incident to warrant-arrest—regardless of how flagrant the initial police illegality.

The Nebraska Supreme Court in *State v. Thompson*, 438 N.W.2d 131, 137 (Neb. 1989), held that a lineup identification of the defendant the day after he was randomly stopped was not subject to exclusion because "[t]he connection between the illegal stop and the outstanding robbery warrant was so attenuated as to dissipate the taint of the illegal stop."[3] In other words, the warrant-arrest "constitute[d] an intervening circumstance sufficient to break the causal connection between the stop and the lineup." *Id.* The Nebraska court considered neither *Brown's* temporal proximity nor flagrancy factors, but found attenuation on the sole ground that the arrest was "based on a source completely independent of and unrelated to" the circumstances leading to the stop, *i.e.*, the outstanding warrant. *Id.*

---

[3] The police officer in *Thompson* testified that he had stopped defendant in response to a dispatch report that a car fitting the description of defendant's car was acting suspiciously, but a dispatch recording disclosed no such report. 438 N.W.2d at 135, 136-37.

The Georgia Court of Appeals in *State v. Cooper*, 579 S.E.2d 754, 755-58 (Ga. App. 2003), *cert. denied* (Ga. July 14, 2003), likewise found attenuation based on an intervening warrant-arrest—without considering temporal proximity or flagrancy. Like the Nebraska court, the Georgia court treated the intervening arrest as dispositive. "'To hold otherwise,'" the court explained, "'would effectively render the outstanding warrant invalid because of po-police conduct unrelated to its issuance, and would immunize [defendant] from arrest for past conduct already properly determined to constitute probable cause for his arrest.'" *Id.* at 757-58 (citation omitted).

The Seventh Circuit may now have joined this camp, but under a different rationale. In *Atkins v. City of Chicago*, 631 F.3d 823 (7th Cir. 2011), the Seventh Circuit considered a federal civil rights action in which Atkins was arrested and jailed (for 37 days) on a parole warrant discovered during an unlawful traffic stop. After addressing *Green* and its progeny, the court explained that "a simpler way to justify the result in those cases (and this one), without talking about 'taints' and 'dissipation' and 'intervening circumstances' . . ., is to note simply that the arrest was based on a valid warrant rather than on anything turned up in the illegal search." *Id.* at 826-27. The Seventh Circuit reasoned that "[i]f police stopped cars randomly, looking for persons against whom there were outstanding warrants, the drivers

and passengers not named in warrants would have good Fourth Amendment claims." *Id.* at 827 On the other hand, "a person named in a valid warrant *has no right to be at large, and so suffers no infringement of his rights when he is apprehended* unless some other right of his is infringed . . . ." *Id.* (emphasis added). Under *Atkins*, then, resort to the attenuation doctrine is unnecessary, and the evidence is admissible, because there is no infringement of a Fourth Amendment right to begin with.

* * *

In sum, courts addressing the attenuation doctrine in preexisting warrant cases have fractured into three different camps, depending on whether they apply the doctrine or how they apply the doctrine. The conflict is outcome-determinative in most cases in which the issue arises, including this one. It is time for this Court to resolve the conflict.

B. The Utah Supreme Court erred in excluding the evidence seized incident to arrest on the preexisting warrant.

The prosecutor in this case conceded that the facts known to Detective Fackrell were just shy of reasonable suspicion to justify an investigatory stop. App. 5; R125:12. The issue here, and in like cases, is whether for that reason, evidence discovered incident to an intervening warrant-arrest should be suppressed. The answer is no.

Operating on "the premise that the challenged evidence [was] in some sense the product of illegal government activity," *Crews*, 445 U.S. at 471—*i.e.*, an investigatory stop unsupported by reasonable suspicion—the Utah courts below turned to the question of attenuation. *See* App. 2, 41, 101. But for the reasons explained by the Seventh Circuit in *Atkins*, *supra*, at 16-17, exclusion was not warranted because there was no Fourth Amendment violation to begin with—Strieff's stop was justified at its inception under the outstanding warrant.[4]

But even assuming police illegality, suppression is not appropriate. The evidence seized in the lawful search incident to arrest did not come "by exploitation" of the challenged stop, but "by means sufficiently distinguishable to be purged of the primary taint," to wit, under the authority of the outstanding warrant. *See Wong Sun*, 371 U.S. at 488.

* * *

It is undisputed that even those who are illegally stopped may be "lawfully arrested on an outstanding warrant" and that a search incident to that arrest is "perfectly appropriate." App. 32; *accord Bailey*, 338 P.3d at 713. For this reason, suppression in a case like this one cannot be defended as deterring the ar-

---

[4] Utah made this argument in the Utah Supreme Court as an alternative ground to affirm the court of appeals' decision. State's Brf. below, at 9-12.

rest or the search incident to arrest. Rather, the object of suppression is to deter investigatory stops that are unsupported by reasonable suspicion. Applying the exclusionary rule is unwarranted in these circumstances because it "'fails to yield 'appreciable deterrence.'" *Davis*, 131 S.Ct. at 2426-27 (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)). The exclusionary remedy is thus not "worth the price paid." *Herring*, 555 U.S. at 144.

The attenuation doctrine "'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its costs.'" *United States v. Leon*, 468 U.S. 897, 911 (1984) (quoting *Brown*, 422 U.S. at 609 (Powell, J., concurring in part)). That point is reached where—"because of time or other intervening factors"—applying the rule "can serve little purpose." *Brown*, 422 U.S. at 610 (Powell, J., concurring in part); *accord Herring*, 555 U.S. at 141 (holding that exclusionary rule "applies only where it 'results in appreciable deterrence'"). Under the circumstances presented here, that point was reached when Strieff was arrested under the preexisting warrant.

1. *Intervening warrant-arrest.* As the Seventh Circuit recognized in *Green*, a lawful arrest on a preexisting warrant—as occurred here—is an intervening circumstance of substantial significance. Compared to a confession or consent-to-search, a

warrant-arrest represents "an even more compelling case for the conclusion that the taint of the original illegality is dissipated." *Green*, 111 F.3d at 522. This is because unlike a confession or consent-to-search, "[a] warrant is not reasonably subject to interpretation or abuse." *Brendlin*, 195 P.3d at 1080 (citing *Green*). The validity of a preexisting warrant is "completely independent of the circumstances that led the officer to initiate" the stop. *Id.* And unlike a confession or consent, a warrant-arrest's validity does not turn on an evaluation of the complex "workings of the human mind." *Brown*, 422 U.S. at 603.

Even more to the point, suppressing the fruits of a lawful search incident to a warrant-arrest under these circumstances serves little purpose. The discovery of an outstanding warrant is a fortuitous event—one upon which an officer cannot safely rely. In the vast majority of stops, a preexisting warrant will not be found and the fruits of the unlawful stop will be suppressed. This represents a substantial and abiding deterrent. *See Mitchell*, 824 N.E.2d at 650 (observing that "possibility that the object of their endeavor will be suppressed if they engage in some unlawful practice is an effective deterrent").

In those relatively few cases where a preexisting warrant is discovered, suppression "'will not further the ends of the exclusionary rule in any appreciable way.'" *Leon*, 468 U.S. at 920 (citation omitted). As in this Court's good-faith cases, "the marginal or nonex-

istent benefits produced by suppressing [the] evidence . . . cannot justify the substantial costs of exclusion." *Id.* at 922. Accordingly, an arrest on an outstanding warrant represents a significant intervening event which disrupts the causal link between the illegality and the evidence.

The Utah Supreme Court held otherwise, concluding that the attenuation doctrine "is directed only at intervening circumstances involving a defendant's independent acts of free will (such as a confession and perhaps a consent to search)." App. 31. The state court's holding was largely premised on its observation that this Court's "attenuation cases have all involved *confessions* made by unlawfully detained individuals." App. 20. But that observation is incorrect. On at least two occasions this Court has applied the attenuation doctrine under circumstances not involving a defendant's free will. *See United States v. Ceccolini*, 435 U.S 268 (1978) (holding that trial testimony was sufficiently attenuated from unlawful police conduct that led to discovery of witness's knowledge); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (holding that intervening commitment by magistrate attenuated lineup identification tainted by unlawful arrest).

In sum, Strieff's warrant-arrest was a significant intervening event which served to substantially weaken, if not sever, the causal chain between the illegality and the discovery of the evidence. Simply

put, suppression is not "worth the price paid" in the relatively few cases where a preexisting warrant is discovered in the course of a stop, the subject is lawfully arrested on the warrant, and evidence is seized incident thereto. *Herring*, 555 U.S. at 144.

2. *Flagrancy.* *Green* and its adherents have pointed to one possible exception—when police make random, dragnet-type, or otherwise arbitrary stops. *See Hummons*, 253 P.3d at 278; *Grayson*, 336 S.W.3d at 148-49; *Shaw*, 64 A.3d at 512; *Mazuca*, 375 S.W.3d at 306. To deter such conduct, suppression might be appropriate when the illegality should have been "obvious" to police, *Brown*, 422 U.S. at 605, or when police otherwise acted in "reckless disregard of constitutional requirements," *Herring*, 555 U.S. at 147-48. But exclusion for conduct short of this "cannot pay its way." *Leon*, 468 U.S. at 908 n.6.

As held by the intermediate appellate court, the investigatory stop in this case was not so flagrant as to justify suppression of the evidence seized in the lawful search incident to the warrant-arrest. *See* App. 70 (holding that officer "did not target Strieff in knowing or obvious disregard of constitutional limitations"). The police had received an anonymous report on its drug tip line that "narcotics activity" was occurring in the home. App. 4. Had the stop been based on the tip alone, it might have been an obvious Fourth Amendment violation. *See Navarette v. California*, 134 S.Ct. 1683, 1688 (2014) (holding that

anonymous tip alone seldom creates reasonable suspicion). But Detective Fackrell acted on "more than the tip itself." *Alabama v. White*, 496 U.S. 325, 329 (1990).

Detective Fackrell conducted some three hours of intermittent surveillance over the course of a week. App. 4. And that surveillance corroborated the tip: Detective Fackrell observed short-term traffic that, in his experience as a trained narcotics detective, was consistent with drug sales activity. App. 4; R125:2-3. Under these circumstances, it was reasonable for Detective Fackrell to believe that he could lawfully stop Strieff to investigate. *See Navarette*, 134 S.Ct. at 1688 (holding that anonymous tip corroborated by police "can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion'") (citation omitted). The prosecutor later conceded that Detective Fackrell was a fact or so shy of reasonable suspicion—having not seen Strieff enter the house, Detective Fackrell could not infer that he was a short term visitor there to buy drugs. *See* App. 5. But if not a short term visitor buying drugs, Strieff could have been a resident selling them.

In any case, the question is not whether reasonable suspicion existed. As in all attenuation cases, illegality is presumed. *Crews*, 445 U.S. at 471. The question is whether "'a reasonably well trained officer would have known that the [detention] was illegal' in light of 'all of the circumstances.'" *Herring*,

555 U.S. at 145 (quoting *Leon*, 468 U.S. at 922 n.23). Given this Court's jurisprudence and Detective Fackrell's corroborative efforts, his decision to investigate was at worst a "reasonable but mistaken judgment[ ]." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (2011) (discussing § 1983 claim).[5]

3. *Temporal proximity.* As noted, *supra*, at 7, *Brown* identified the temporal proximity of the illegality and the defendant's statement as a relevant factor in assessing attenuation in confession cases. Temporal proximity is logically relevant in confession and consent-to-search cases because the shorter the interval between the illegality and confession or consent, the more likely the illegality "bolstered the pressures" to confess or consent and the less likely the confession or consent was "sufficiently a product

---

[5] Some courts have also inquired into an officer's subjective motives in assessing *Brown's* flagrancy factor. *See, e.g., Brendlin*, 195 P.3d at 1081 (concluding that record did not show officer "invented a justification for the traffic stop") (internal quotation marks and citation omitted); *Frierson*, 926 So.2d at 1144-45 (concluding that record did not show stop was "pretextual or in bad faith"). But the law is settled that "[t]he pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness [or motives] of arresting officers." *Herring*, 555 U.S. at 145. Thus, when assessing flagrancy, the inquiry "'is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the [stop] was illegal' in light of 'all of the circumstances.'" *Id.* (quoting *Leon*, 468 U.S. at 922 n.23).

of free will [to] break, for Fourth Amendment purposes, the causal connection." *See Brown*, 422 U.S. at 603, 605 n.12; *accord Green*, 111 F.3d at 522 (applying same reasoning); *Simpson*, 439 F.3d at 495 & n.3 (same); *Shaw*, 64 A.3d at 509-10 (same).

But the same cannot be said in preexisting warrant cases. In the case of a warrant-arrest, "consent (or any act for that matter) by the defendant is not required." *Green*, 111 F.3d at 522. Nothing a defendant does at the time of the stop affects the existence of the preexisting warrant. Thus, "[a]ny influence the unlawful stop would have on the defendant's conduct is irrelevant." *Id.* For that reason, *Brown's* temporal proximity factor is not relevant here.

* * *

In sum, because Detective Fackrell's investigatory stop was not flagrantly unlawful, the intervening warrant-arrest broke the causal chain between the stop and discovery of evidence on Strieff's person. Under these circumstances, the evidence did not come "by exploitation" of the challenged stop, but "by means sufficiently distinguishable to be purged of the primary taint," to wit, under the authority of the outstanding arrest warrant. *Wong Sun*, 371 U.S. at 488.

C. This case is an ideal vehicle for resolving this important and recurring issue.

The importance of this question is great. It is undisputed that in these cases, a warrant-arrest is

lawful and that a search incident to arrest is lawful. Evidence seized under these circumstances is thus the direct product of a *lawful* search. The exclusion of such evidence can only be justified in rare circumstances, if at all. *See Atkins*, 631 F.3d at 827 (explaining that "a person named in a valid warrant has no right to be at large, and so suffers no infringement of his rights when he is apprehended"). As evidenced by the numerous cases cited from both federal and state appellate courts, this is a recurring issue, and one which the lower courts have been unable to resolve with any sort of uniformity. For these reasons, there is a compelling need for this Court's intervention and guidance.

And this case represents an ideal vehicle for resolving this important and recurring issue: the parties agreed that the officer lacked reasonable suspicion to support an investigatory stop; the lawfulness of the warrant-arrest was unchallenged; the question presented is the only issue the Utah courts addressed; and those courts squarely decided that question under the Fourth Amendment. Additionally, there are no factual or procedural obstacles to this Court's resolving the issue. It is time for this Court to end the debate on this important and recurring issue.

CONCLUSION

For the reasons stated above, the Court should grant the State's petition for a writ of certiorari.

Respectfully submitted,

SEAN D. REYES
Utah Attorney General
JEFFREY S. GRAY*
Assistant Attorney General
BRIDGET ROMANO
Utah Solicitor General
LAURA DUPAIX
Criminal Appeals Director
Counsel for Petitioner
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180
Email: jgray@utah.gov

**Counsel of Record*

APPENDIX

IN THE
SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Respondent,

v.

EDWARD JOSEPH STRIEFF, JR.,
Petitioner.

No. 20120854
Filed January 16, 2015

On Certiorari to the Utah Court of Appeals

Third District, Salt Lake
The Honorable Michele M. Christiansen
No. 071900011

Attorneys:

Sean D. Reyes, Att'y Gen., Jeffrey S. Gray, Asst. Att'y Gen.,
Salt Lake City, for respondent

Joan C. Watt, Robert K. Engar, Salt Lake City, for petitioner

---

JUSTICE LEE authored the opinion of the Court, in which
CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE NEHRING,
JUSTICE DURHAM, and JUSTICE PARRISH joined.

JUSTICE LEE, opinion of the Court:

¶1 In this case we are asked to determine the applicability of the "attenuation" exception to the exclusionary rule to a fact pattern addressed in a broad range of lower-court opinions but not by the United States Supreme Court. The essential fact pattern involves an unlawful detention leading to the discovery of an arrest warrant followed by a search incident to arrest. The attenuation inquiry is essentially a proximate cause analysis. It asks whether the fruit of the search is tainted by the initial, unlawful detention, or whether the taint is dissipated by an intervening circumstance. As applied to the outstanding warrant scenario, the question presented is whether and how to apply the attenuation doctrine in this circumstance.

¶2 The lower courts are in disarray in their application of the attenuation doctrine to the outstanding warrant scenario. In some courts the discovery of an outstanding warrant is deemed a "compelling" or dispositive "intervening circumstance," purging the taint of an initially unlawful detention upon a showing that the detention was not a "purposeful" or "flagrant" violation of the Fourth Amendment.[1] In other courts, by contrast, the outstanding warrant is a

---

[1] *United States v. Green*, 111 F.3d 515, 522, 23 (7th Cir. 1997).

matter of "'minimal importance.'" and the doctrine's applicability is strictly curtailed.[2]

¶3 We adopt a third approach. We conclude that the attenuation exception is limited to the general fact pattern that gave rise to its adoption in the United States Supreme Court—of a voluntary act of a defendant's free will (as in a confession or consent to search). For cases arising in the context of two parallel acts of police work—one unlawful and the other lawful—we interpret the Supreme Court's precedents to dictate the applicability of a different exception (inevitable discovery).

¶4 Our holding is rooted in our attempt to credit the terms of the attenuation doctrine as prescribed in the Supreme Court's opinions, while also respecting the parallel doctrine of inevitable discovery. Thus, we read the Court's attenuation cases to define the conditions for severing the proximate causal connection between a threshold act of police illegality and a subsequent, intervening act of a defendant's free will. And in the distinct setting of both unlawful and then lawful police activity, we deem the inevitable discovery doctrine to control. Because this case involves no independent act of a defendant's free will and only two parallel lines of police work, we hold

---

[2] *State v. Moralez*, 300 P.3d 1090, 1102 (Kan. 2013) (quoting *State v. Hummons*, 253 P.3d 275, 278 (Ariz. 2011)).

that the attenuation doctrine is not implicated, and thus reverse the lower court's invocation of that doctrine in this case.

I. Background

¶5 In December, 2006, an anonymous caller left a message on a police drug tip line reporting "narcotics activity" at a South Salt Lake City residence. Police officer Douglas Fackrell subsequently conducted intermittent surveillance of the residence for approximately three hours over the course of about one week. During that time, the officer observed "short term traffic" at the home. The traffic was not "terribly frequent," but was frequent enough that it raised Officer Fackrell's suspicion. In Officer Fackrell's view, the traffic was more than one would observe at a typical house, with visitors often arriving and then leaving within a couple of minutes. Thus, the officer concluded that traffic at the residence was consistent with drug sales activity.

¶6 During his surveillance of the residence, Officer Fackrell saw Edward Strieff leave the house—though he did not see him enter—and walk down the street toward a convenience store. As Strieff approached the convenience store, Officer Fackrell ordered Strieff to stop in the parking lot. Strieff complied. Officer Fackrell testified that he detained Strieff because "[Strieff] was coming out of the house that [he] had been watching and [he] decided that [he'd] like to ask somebody if [he] could find out

what was going on [in] the house." Officer Fackrell identified himself as a police officer, explained to Strieff that he had been watching the house because he believed there was drug activity there, and asked Strieff what he was doing there.

¶7 Officer Fackrell also requested Strieff's identification, which Strieff provided. Officer Fackrell then called dispatch and asked them to run Strieff's ID and check for outstanding warrants. Dispatch responded that Strieff had "a small traffic warrant." Officer Fackrell then arrested Strieff on the outstanding warrant and searched him incident to the arrest. During the search, the officer found a baggie of methamphetamine and drug paraphernalia in Strieff's pockets.

¶8 Strieff was charged with unlawful possession of methamphetamine and unlawful possession of drug paraphernalia. He moved to suppress the evidence seized in the search incident to his arrest, arguing that it was fruit of an unlawful investigatory stop. The State conceded that Officer Fackrell had stopped Strieff without reasonable articulable suspicion (given that Officer Fackrell had not seen Strieff enter the house, did not know how long he had been there, and knew nothing of him other than that he left the house). The State argued, however, that the exclusionary rule did not bar the evidence seized in the search because the attenuation exception to the exclusionary rule applied.

¶9 The district court agreed and denied Strieff's motion to suppress and subsequent motion to reconsider. First, the district court found that Officer Fackrell "believed he had seen enough short-term traffic at the house to create a reasonable suspicion that the house was involved in drug activity," and thus that the purpose of the stop "was to investigate a suspected drug house." Second, while acknowledging that Officer Fackrell's belief that he had sufficient suspicion to stop Strieff was incorrect, the court concluded that "the stop was not a flagrant violation of the Fourth Amendment" but a "good faith mistake on the part of the officer as to the quantum of evidence needed to justify an investigatory detention." Finally, "[w]eighing the factors in their totality," the court found "suppression to be an inappropriate remedy," concluding that "the search was conducted after discovering an outstanding warrant and arresting the Defendant on that warrant, an intervening circumstance that Officer Fackrell did not cause and could not have anticipated."

¶10 Strieff entered a conditional guilty plea to charges of attempted possession of a controlled substance and possession of drug paraphernalia, reserving his right to appeal the order denying his motions to suppress and reconsider. The court of appeals affirmed under the attenuation exception to the exclusionary rule recognized in *Brown v. Illinois*, 422 U.S. 590 (1975). *State v. Strieff*, 2012 UT App 245, 286 P.3d 317 Applying the factors set forth in *Brown*, a

majority of the court of appeals concluded that the discovery of an outstanding arrest warrant was a powerful "intervening circumstance" dissipating the taint of the unlawful detention, and that Officer Fackrell's detention of Strieff was not a "purposeful" or "flagrant" violation of the Fourth Amendment. *Id.* at ¶¶ 21, 27. And although the "temporal proximity" of the discovery of the warrant weighed against attenuation, the majority deemed that factor outweighed by the existence of an intervening circumstance and the lack of a purposeful or flagrant violation. *Id.* at 29–30, 37.

¶11 Judge Thorne dissented. He disagreed with the majority's analysis of the attenuation factors as applied to this case. *Id.* at ¶¶46, 48–50. And he expressed discomfort with what he saw as an inconsistency between the outcome of this case and that of *State v. Topanotes*, 2003 UT 30, 76 P.3d 1159, a case arising under similar facts but decided under the inevitable discovery exception. Strieff filed a petition for certiorari, which we granted.

¶12 On certiorari, we review not the underlying decision of the district court but the ultimate decision of the court of appeals—a decision that merits no deference in our analysis. *See State v. Verde*, 2012 UT 60, ¶ 13, 296 P.3d 673. "That said, [t]he correctness of the court of appeals' decision turns, in part, on whether it accurately reviewed the district court's decision under the appropriate standard of review."

Id. (alteration in original) (internal quotation marks omitted). And the deference, if any, we owe to the district court's decision varies depending on the nature of the determination in question.

¶13 First, any factual determinations made by the district court are entitled to substantial deference under a standard of review for clear error. *See Manzanares v. Byington (In re Adoption of Baby B.)*, 2012 UT 35, ¶ 40, 308 P.3d 382. Second, to the extent the district court's decision implicated pure legal questions regarding the terms and conditions of the attenuation exception, the court's resolution of those questions is reviewed for correctness. *See Hi-Country Prop. Rights Grp. v. Emmer*, 2013 UT 33, ¶¶ 13–14, 304 P.3d 851 (noting that threshold legal determinations embedded within mixed determinations are reviewed for correctness like any other determination of law). Finally, the district court's application of the attenuation exception to the facts of this case is likewise a determination that is reviewed for correctness. *See State v. Worwood*, 2007 UT 47, ¶¶ 11–12, 164 P.3d 397. Although that decision is a "mixed" determination of fact and law, it is one of those decisions that is "law-like" in that our resolution of it lends itself to "consistent resolution by a uniform body of appellate precedent." *In re Baby B.*, 2012 UT 35, ¶ 44.

II. The Exclusionary Rule and the Attenuation Doctrine

¶14 Although this case concerns a single exception to the exclusionary rule (attenuation), that exception is best conceptualized within the broader context of the rule and as one of a range of exceptions that define its limits. We accordingly start with first principles, explaining the basis for the rule and describing the contours of various exceptions that are related to the attenuation doctrine (independent source and inevitable discovery). From there we outline the elements of the attenuation exception as relevant to the disposition of this case. And we conclude this section by outlining the approaches that various lower courts (state and federal) have taken in cases involving the attenuation doctrine and the discovery of an outstanding arrest warrant.

A. The Rule and its Exceptions

¶15 The Fourth Amendment protects against unreasonable searches and seizures. *See* U.S. CONST. amend. IV. The exclusionary rule is a judicial remedy that gives life to that protection. In its most basic terms, the exclusionary rule suppresses the admission of evidence obtained in violation of the Constitution. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961). It is a prudential doctrine, created by courts to "compel respect for the constitutional guaranty." *Davis v. United States*, __ U.S. __, 131 S. Ct. 2419, 2426 (2011) (citations omitted). There is no constitutional

right to exclusion, nor is the doctrine designed to redress the injury occasioned by a Fourth Amendment violation. *Id.* (internal quotation marks omitted). The exclusionary rule's "sole purpose . . . is to deter future Fourth Amendment violations." *Id.*

¶16 While deterrent value is a "necessary condition for exclusion," it is "not a sufficient one." *Id.* at 2427 (internal quotation marks omitted). Exclusion of otherwise-relevant and probative evidence from criminal proceedings "exacts a heavy toll on both the judicial system and society at large." *Id.* at 2427. The rule, after all, often "suppress[es] the truth and set[s] the criminal loose in the community without punishment." *Id.* at 2427 (internal quotation marks omitted).

¶17 The terms and conditions of the exclusionary rule must appropriately account for these concerns. Thus, "[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Id.*

¶18 The exclusionary rule is far from absolute. In the simplest case for exclusion, evidence is "direct or primary in its relationship to the [police action]." 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, § 9.3(a) (3d ed. 2007) (internal quotation marks omitted). In those cases, the connection between the illegal police action and the evidence is clear and close. In other cases, the challenged evidence is less directly connected to the illegality, but is "secondary or de-

rivative in character." *Id.* (describing as "secondary" or "derivative," examples such as "physical evidence located after an illegally obtained confession, or an in-court identification . . made following an illegally conducted pretrial identification"). In these cases, there is a disconnect—factual, legal, or temporal—between the unconstitutional conduct and the evidence. These disconnects give rise to a series of exceptions to the exclusionary rule.

B. Independent Source, Inevitable Discovery, and Attenuation

¶19 Evidence seized as a result of an illegal search or seizure may be admitted under three "closely related but analytically distinct" exceptions to the exclusionary rule: (1) the independent source exception, (2) the inevitable discovery exception, and (3) the attenuation exception. *United States v. Terzado-Madruga*, 897 F.2d 1099, 1113 (11th Cir. 1990).

¶20 Under the independent source doctrine, the "taint" that is otherwise-attached to the fruit of police misconduct is removed when the same fruit is derived from lawful police activity. *See Murray v. United States*, 487 U.S. 533, 537 (1988). In the classic independent source scenario, "an unlawful entry has given investigators knowledge of facts *x* and *y*, but fact *z* has been learned by other means." *Id.* at 538. In *Segura v. United States*, 468 U.S. 796, 800–01 (1984), for example, drug enforcement agents unlawfully entered defendant's apartment and re-

mained there until a search warrant was obtained. The United States Supreme Court deemed the evidence acquired pursuant to the valid, untainted warrant admissible because it was discovered pursuant to an "independent source." *Id.* at 813–14.

¶21 This exception has also been extended to circumstances where the fruit obtained through an independent source was *itself* previously obtained unlawfully—"that is, in the example just given, to knowledge of facts *x* and *y*," and not just *z*. *Murray*, 487 U.S. at 538. In *Murray*, drug enforcement agents entered a warehouse unlawfully and observed burlap-wrapped bales of marijuana, but then subsequently seized the same evidence upon execution of a valid search warrant. Assuming the agents "would have sought a warrant [even] if they had not earlier entered the warehouse" (a matter not resolved on the record in *Murray* and thus meriting a remand), the Supreme Court held that the execution of the warrant would remove the taint of the earlier unlawful entry. *Id.* at 542–43 (noting that the search pursuant to the warrant would not have been a "genuinely independent source . . . if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant") (footnote omitted).

¶22 The independent source doctrine thus turns on cause-in-fact analysis. A source is *independent*—in a manner removing the taint arising from a prior act of police misconduct—if it actually led to the discovery of the evidence in question and would have done so even in the absence of police misconduct. Where that is the case, there is no longer a sufficient deterrence-based justification for exclusion:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Nix v. Williams, 467 U.S. 431, 443 (1984) (emphasis added) (footnote omitted) (citations omitted).

¶23 The inevitable discovery doctrine is related. Here the classic case is *Nix*. In *Nix*, the defendant had made incriminating statements in response to police investigation impinging on the right to counsel—which statements led police to the discovery of a victim's dead body. *Id.* at 435. But the record also indicated that a search had been underway that in-

evitably would have led to the discovery of the victim's body but for the defendant's unlawfully obtained statements. *Id.* at 448–50. And the *Nix* Court upheld the admissibility of the fruit of the unlawful investigation based on an inevitable discovery rationale—holding that "when, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible." *Id.* at 448.

¶24 Both the independent source doctrine and the inevitable discovery exception are rooted in cause-in-fact analysis. The former forecloses exclusion when tainted fruits are actually obtained through a truly independent source. The latter prescribes the same result if the tainted evidence inevitably *would have been discovered* by lawful means.

¶25 The attenuation exception is distinct. It turns not on cause-in-fact analysis but on a question of *legal* cause. Thus, under *Wong Sun v. United States*, 371 U.S. 471 (1963), and *Brown v. Illinois*, 422 U.S. 590 (1975), evidence that would not have been secured but for an unlawful search or seizure is nonetheless admissible if the legal nexus between the police misconduct and the challenged evidence is sufficiently attenuated that any tainting of the evidence is dissipated. *Wong Sun*, 371 U.S. at 487–88 (declining to "hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light

but for the illegal actions of the police") (emphasis added) (internal quotation marks omitted)).

¶26 In *Wong Sun*, federal drug agents arrested the defendant without probable cause, but he returned to the station house several days later and gave a voluntary confession. *Id.* at 491. The Court ruled that drugs seized pursuant to the unlawful arrest were properly excluded as fruit of a poisonous tree. *Id.* at 487 (noting that "this is not the case envisioned by this Court where the exclusionary rule has no application because the Government learned of the evidence 'from an independent source'"). As to the confession, however, the Court held that it might escape exclusion even if "it would not have come to light but for the illegal actions of the police." *Id.* at 488. Specifically, the Court held that the admissibility of the confession should turn on "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* (internal quotation marks omitted).

¶27 Ultimately, the *Wong Sun* Court held the confession admissible under this standard. "On the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement," the Court held "that the connection be-

tween the arrest and the statement had 'become so attenuated as to dissipate the taint.'" *Id.* at 491.

¶28 The *Wong Sun* standard was extended in *Brown*. There, the defendant was also arrested without probable cause and gave a subsequent confession, but this time the confession came within two hours after the arrest. *Brown*, 422 U.S. at 604. The *Brown* Court found such a confession not to satisfy the fact-intensive, case-by-case analysis called for under the attenuation doctrine. *Id.* at 604–05. In so doing, however, the Court articulated three factors of relevance to the analysis: the "temporal proximity of the arrest and the confession"; the "presence of intervening circumstances"; and the "purpose and flagrancy of the official misconduct." *Id.* at 603–04. These factors weighed in favor of exclusion in *Brown* because the confession was given just two hours after the arrest without any intervening event of any significance, and the arrest was patently illegal and undertaken "in the hope that something might turn up." *Id.* at 605.

¶29 The Court reached a similar conclusion in *Kaupp v. Texas*, 538 U.S. 626 (2003). There the Court applied the *Brown* factors and found the defendant's confession to be the fruit of his prior illegal arrest. *Id.* at 633. In so doing the Court emphasized that (1) there was "no indication . . . that any substantial time passed between Kaupp's removal from his home in handcuffs and his confession after only

10 or 15 minutes of interrogation"; (2) at least some of the six officers involved in taking him into custody "were conscious that they lacked probable cause to arrest"; and (3) "the State ha[d] not even alleged 'any meaningful intervening event' between the illegal arrest and Kaupp's confession." *Id.* at 633.

¶30 Thus, the attenuation exception eschews the "but for" approach to causation that drives the independent source and inevitable discovery exceptions. *See United States v. Ceccolini*, 435 U.S. 268, 276 (1978) (noting that the Court has "declined to adopt a 'per se' or 'but for' rule that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest'). It instead endorses a more nuanced analysis akin to proximate causation. In asking whether the attenuation exception applies, we assess whether the causal chain has been broken by intervening circumstances.[3] And we do so in the light of the exclusionary rule's deterrence function. Thus, we "mark the point at which the detriment of illegal police action be-

---

[3] *See* Albert W Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. OF CRIM. LAW 463, 478-79 (2009) (noting the Supreme Court's use of attenuation as "refer[ring] to situations in which the causal chain between a Fourth Amendment violation and the seizure of evidence ha[s] been broken.").

comes so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." LAFAVE ET AL., *supra* , § 9.3(c)).

C. The Attenuation Factors

¶31 The Supreme Court has set out (and we have applied) a three-factor test to guide the attenuation inquiry. The three factors are: (1) the "temporal proximity" of the unlawful detention and the discovery of incriminating evidence, (2) the presence of "intervening circumstances," and (3) the "purpose and flagrancy" of the official misconduct. *Brown*, 422 U.S. at 603–04 (1975); *State v. Arroyo*, 796 P.2d 684, 690 n.4 (Utah 1990).

¶32 The threshold inquiry for attenuation analysis concerns the existence of "intervening circumstances." Such circumstances are those that establish a break in the legal chain of events leading to the discovery of the evidence at issue. *See United States v. Green*, 111 F.3d 515, 522 (7th Cir. 1997). Thus, a circumstance is "intervening" if it is so distinct from the threshold Fourth Amendment violation that it can be said that the challenged evidence is not a product of "exploitation" of the illegality but instead the result of "'means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun*, 371 U.S. at 488 (internal quotation marks omitted).

¶33 A prototypical intervening circumstance involves a voluntary act by the defendant, such as a confession or consent to search given after illegal po-

lice action. A voluntary confession or consent to search might be the but-for product of an unlawful search or seizure, but exclusion is foreclosed where the defendant's voluntary act is sufficiently independent to break the legal connection to the primary violation. Under the caselaw, the independence of such voluntary acts is established, for example, where the confession or consent comes well after termination of a defendant's illegal detention, after defendant's consultation with counsel, or as a spontaneous comment not in response to any police interrogation. *See* LAFAVE, *supra*, § 9.4(a). Increasingly, courts have extended this principle to the discovery of an outstanding arrest warrant, *see infra* ¶ 38 n.5, a question to which we will turn shortly.

¶34 Under the governing standard set forth in *Brown*, the question whether a particular circumstance is sufficiently "intervening" to dissipate the taint associated with a primary Fourth Amendment violation "must be answered on the facts of each case." *Brown*, 422 U.S. at 603. And that analysis, in turn, depends on the relationship between the "intervening circumstance" factor, on one hand, and the "purpose and flagrancy" and "temporal proximity" considerations, on the other.

¶35 Conduct is "purposeful" if it is "investigatory in design and purpose and executed in the hope that something might turn up." *United States v. Simpson*, 439 F.3d 490, 496 (8th Cir. 2006) (internal quotation

marks omitted). "Flagrant" conduct is that which is obviously improper—so far beyond the bounds of the Fourth Amendment that law enforcement must have seen it as unlawful but chose to engage in it anyway. *See id.*

¶36 Generally, close "temporal proximity" between the illegality and discovery of the evidence weighs in favor of suppression. *See State v. Shoulderblade*, 905 P.2d 289, 293 (Utah 1995). Thus, a "brief time lapse" between a Fourth Amendment violation and the evidence obtained may "indicate[] exploitation because the effects of the misconduct have not had time to dissipate." *Id.*

D. Attenuation and Outstanding Arrest Warrants

¶37 To date, the United States Supreme Court's attenuation cases have all involved *confessions* made by unlawfully detained individuals.[4] Thus, the ques-

---

[4] *See, e.g.*, *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (suppressing defendant's murder *confession* following unlawful arrest); *Taylor v. Alabama*, 457 U.S. 687, 694 (1982) (excluding a *confession* after finding insufficient attenuation); *Dunaway v. New York*, 442 U.S. 200, 219 (1979) (excluding a *confession* obtained after an unlawful arrest); *Brown v. Illinois*, 422 U.S. 590, 605 (1975) (holding that a confession was sufficiently attenuated); *Wong Sun v. United States*, 371 U.S. 471, 478–79 (1963) (excluding evidence of narcotics obtained through unlawfully obtained and tainted *confession*).

This is a complete list of United States Supreme Court cases applying the attenuation *doctrine*. But it is certainly not

(continued . .)

tion presented here—of the applicability of the attenuation doctrine to the discovery of an outstanding arrest warrant in the course of an unlawful arrest or detention—is a matter heretofore left to the lower courts.

¶38 Three principal approaches have emerged on this issue. One set of decisions, exemplified by *United States v. Green*, 111 F.3d at 522, concludes that an outstanding arrest warrant may qualify as "an even more compelling case" for an "intervening circumstance" than a voluntary confession. *Id.* [5] The

---

an exhaustive list of cases in which the Court has employed the term "attenuation" in framing the exclusionary rule. That term has been used in reference to a general principle of causation, in connection with other principles of and exceptions to the exclusionary rule. *See Hudson v. Michigan*, 547 U.S. 586, 593 (2006) (holding that a violation of the knock-and-announce rule was sufficiently attenuated); *United States v. Leon*, 468 U.S. 897, 911 (1984) (stating that the police misconduct and the evidence of crime "may be sufficiently attenuated" to be admissible); *Segura v. United States*, 468 U.S. 796, 805 (1984) (explaining the inevitable discovery doctrine in general attenuation terms).

[5] *See United States v. Simpson*, 439 F.3d 490, 495 (8th Cir. 2006) (adopting *Green*'s "compelling case" language); *State v. Hill*, 725 So.2d 1282, 1287 (La. 2008) (stating that the discovery of outstanding warrants was a "significant intervening event"); *Hardy v. Commonwealth*, 149 S.W.3d 433, 436 (Ky. App. 2004) (holding that the intervening circumstance of the outstanding warrant "outweighed any possible [police] misconduct").

threshold basis for this determination in *Green* was the assertion that "[i]t would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of 'Olly, Olly, Oxen Free.'" *Id.* at 521. In addition, the *Green* court suggested that an outstanding warrant is in some sense more independent of lawful police activity than a voluntary confession. The basis for that conclusion was the assertion that "[a]ny influence the unlawful stop would have on the defendant's conduct is irrelevant," and thus that "there is less 'taint' than in the cases already recognized by the Supreme Court and this and other circuits as fitting within the intervening circumstances exception. *Id.* at 522. Thus, the *Green* court extended the attenuation doctrine to a case involving the discovery of an outstanding warrant in the course of an unlawful arrest.[6] It did so on the basis of its conclu-

---

[6] Within this first approach to attenuation, there appears to be two lines of cases. One line expressly characterizes the discovery of an outstanding warrant as a "compelling case" for an intervening circumstance (as in *Green*). *See, e.g., Simpson*, 439 F.3d at 496 (holding that defendant's outstanding arrest warrant constituted an "extraordinary intervening circumstance"); *People v. Murray*, 728 N.E.2d 512, 516 (Ill. App Ct. 2000) (adopting *Green*'s analysis as "instructive"). A second line deems the outstanding warrant a dispositive consideration, but without any express characterization of the warrant as a "compelling" or "extraordinary" intervening circumstance. *See, e.g.,*

(continued .)

sion that the "purpose" of the stop in question was not to seek evidence against the defendant in question (Green) but "to obtain evidence against" a third party (Williams), and that there was "no evidence of bad faith on the part of the police," or any indication that "the police exploit[ed] the stop in order to search [Green's] automobile." *Id.* at 523.[7]

¶39 A second set of cases deems the discovery of an outstanding warrant a matter of "'minimal importance'" under the attenuation factors set out in *Brown*, and thus carefully limits the doctrine's ap-

---

McBath v. State, 108 P.3d 241, 248–49 (Alaska Ct. App. 2005); *People v. Brendlin*, 195 P.3d 1074, 1080 (Cal. 2008); *People v. Hillyard*, 589 P.2d 939, 941 (Colo. 1979); *State v. Frierson*, 926 So. 2d 1139, 1144 (Fla. 2006); *State v. Cooper*, 579 S.E.2d 754, 758 (Ga. App. 2003); *State v. Page*, 103 P.3d 454, 460 (Idaho 2004); *Quinn v. State*, 792 N.E.2d 597, 602 (Ind. Ct. App. 2003); *State v. Martin*, 179 P.3d 457, 458–63 (Kan. 2008); *Hill*, 725 So.2d at 1285; *Cox v. State*, 916 A.2d 311, 323 (Md. 2007); *People v. Reese*, 761 N.W.2d 405, 412 (Mich. Ct. App. 2008); *State v. Grayson*, 336 S.W.3d 138, 147 (Mo. 2011) (en banc); *State v. Thompson*, 438 N.W.2d 131, 137 (Neb. 1989); *Jacobs v. State*, 128 P.3d 1085, 1089 (Okla. Crim. App. 2006); *State v. Dempster*, 434 P.2d 746, 748 (Or. 1967) (abrogated by *State v. Bailey*, 338 P.3d 702 (Or. 2014); *Lewis v. State*, 915 S.W.2d 51, 54 (Tex. Ct. App. 1995).

[7] *See also Page*, 103 P.3d at 459 (finding attenuation in conjunction with a conclusion that police conduct was neither flagrant nor motivated by an improper purpose); *Quinn*, 792 N.E.2d at 602 (finding "no evidence suggesting any impropriety as the purpose for stopping Quinn").

plicability in the warrant scenario. *See State v. Moralez*, 300 P.3d 1090, 1102 (Kan. 2013).[8] These cases are motivated by the concern that "[w]ere it otherwise, law enforcement officers could randomly stop and detain citizens, request identification, and run warrants checks despite the lack of any reasonable suspicion to support the detention." *Id.* at 1102.[9] And they narrowly circumscribe the applicability of the

---

[8] *See also United States v. Gross*, 662 F.3d 393, 404–06 (6th Cir. 2011) (holding that the discovery of a valid warrant is a factor but is not "dispositive"); *State v. Bailey*, 338 P.3d 702, 704 (Or. 2014) (en banc) (overruling prior precedent establishing a *per se* rule that outstanding warrants attenuate taint and concluding that "the weight assigned to the discovery of the arrest warrant depends on the degree to which it was the direct consequence or objective of the unlawful detention"); *State v. Mazuca*, 375 S.W.3d 294, 306 (Tex. Crim. App. 2012) (holding that the discovery of an outstanding arrest warrant "should not be overemphasized to the ultimate detriment of the goal of deterrence that animates the exclusionary rule").

[9] *See also People v. Padgett*, 932 P.2d 810, 816–17 (Colo. 1997) (holding that the subsequent discovery of a possible warrant did not overcome the other factors favoring suppression); *People v. Mitchell*, 824 N.E.2d 642, 650 (Ill. App. Ct. 2005) (justifying the refusal to extend the attenuation doctrine on the ground that suppression "appears to be the only way to deter police from randomly stopping citizens for the purpose of running warrant checks"); *State v. Soto*, 179 P.3d 1239, 1244–45 (N.M. Ct. App. 2008) (relying on *Mitchell*, holding that an outstanding warrant did not sufficiently remove the taint of the initial unlawful conduct).

attenuation doctrine by concluding that (a) the short time between an unlawful detention and a search incident to an arrest on an outstanding warrant "weighs heavily" against attenuation,[10] and (b) an improper detention followed by a warrant search "often will[] demonstrate at least some level of flagrant conduct"—of an "investigatory detention[] designed and executed in the hope that something might turn up"—even if "the detention is brief and the officers are courteous," *id.* at 1103.

¶40 The third approach to the attenuation doctrine takes the second a step further. Under this third approach, an outstanding warrant is less than a factor of "minimal importance" under the attenuation doctrine; it is a matter that just doesn't implicate the doctrine at all. This approach was articulated in a dissenting opinion in *State v. Frierson*, 926 So.2d 1139 (Fla. 2006) (Pariente, C.J., dissenting). In the *Frierson* case, Chief Justice Pariente proposed to limit the attenuation doctrine to its original basis—to cases involving voluntary confessions resulting

---

[10] *See also Padgett*, 932 P.2d at 816–17 (stating that the evidence was obtained directly as a result of the unlawful stop "without sufficient intervening time and circumstances to carry the prosecutions' burden of proof to demonstrate dissipation of the taint"); *Bailey*, 338 P.3d at 713 (stating that the short time between the unlawful detention and the discovery of the challenged evidence makes it "less likely" to "break the causal chain").

from an independent act of a defendant's "free will"—and thus to decline to extend it to circumstances involving the discovery of an outstanding warrant. *Id.* at 1149–50 (relying on *Brown*'s articulation of the attenuation doctrine in terms of "whether a confession [that] is the product of a free will" can be deemed an "intervening event" cutting off the causal connection to the unlawful arrest). Because "the defendant's free will plays no role in the discovery of evidence in a search incident to arrest pursuant to an active warrant discovered during an illegal stop," Chief Justice Pariente asserted that the latter circumstance "bears little resemblance to that of a defendant who confesses or consents to a search for reasons that may be attenuated from the illegality of the stop." *Id.* at 1150. And the *Frierson* dissent accordingly would have declined to extend the attenuation doctrine to cases involving an unlawful detention leading to the discovery of an outstanding warrant, concluding that in this scenario "[t]here is no break in the chain of circumstances from the illegal detention to the discovery of evidence in the form of an act of free will on the part of the defendant." *Id.* at 1151.

III. Attenuation as Applied to This Case

¶41 The threshold question presented concerns the applicability of the attenuation doctrine to cases involving the discovery of an outstanding warrant in the course of an unlawful detention. Strieff urges a view of attenuation along the lines of the *Frierson* dissent described above, asking us to restrict the doctrine to circumstances involving an independent act of a defendant's "free will" in confessing to a crime or consenting to a search. And because the discovery of an outstanding warrant is not an independent act of free will but a direct result of an unlawful detention, Strieff asks us to deem the attenuation doctrine inapplicable.

¶42 We reverse on that basis. For a number of reasons, we conclude that attenuation is limited to the circumstances of the cases embracing this doctrine in the Supreme Court—involving a defendant's independent acts of free will. And in the distinct circumstance involving the discovery of an outstanding warrant, we conclude that a different doctrine—the inevitable discovery exception—controls.

¶43 The origins of attenuation are in cases involving independent acts of criminal defendants. *Wong Sun*, *Brown*, and *Kaupp* all involved a confession given by a defendant after an initial unlawful ar-

rest.[11] And the logic and terms of the attenuation doctrine developed in these cases are focused on separating the initial police illegality from the subsequent, independent acts of a defendant.

¶44 The seminal decision in *Brown* speaks in terms of whether a defendant's "statements (verbal acts, as contrasted with physical evidence) were of sufficient free will as to purge the primary taint of the unlawful arrest." 422 U.S. 590, 600 (1975). And the *Brown* Court quoted *Wong Sun*'s formulation of the central inquiry under the attenuation doctrine in parallel terms—of whether a defendant's voluntary statement was "'sufficiently an act of free will to purge the primary taint'" of the unlawful arrest. *Id.* at 602 (quoting *Wong Sun v. United States*, 371 U.S. 471, 486–87 (1963)).

¶45 The significance of a defendant's independent act of "free will" is also arguably inherent in the proximate cause premises of the *Brown* formulation. Attenuation is focused on *intervening circumstances* sufficient to break the proximate connection to the initial violation of the Fourth Amendment. An *intervening* cause is a "means sufficiently distinguishable" from the threshold illegality that the taint of the initial violation is purged. *Hudson v. Michigan*, 547 U.S. 586, 592 (2006) (internal quotation marks omit-

---

[11] *See supra* ¶ 37, n.4.

ted). The terminology is significant. In proximate cause parlance, an *intervening cause* is a subsequent, independent occurrence that materially contributes to the result. *See McCorvey v. Utah State Dep't. of Transp.*, 868 P.2d 41, 45 (Utah 1993); RESTATEMENT (SECOND) OF TORTS § 442 (1965). Such a cause cuts off the legal causal connection to the act of an initial tortfeasor where the intervening cause is not foreseeable (and is thus a *superseding cause*). *See Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252, 1257 (Utah 1996).

¶46 This concept cannot easily be extended to the discovery of an outstanding warrant. The discovery of an outstanding warrant is hardly an independent act or occurrence. It is part of the natural, ordinary course of events arising out of an arrest or detention. And in that sense, even if the warrant could be thought of as somehow intervening, it would hardly be unforeseeable. So to the extent the attenuation doctrine is about proximate cause, *see supra* ¶ 45, an outstanding warrant does not qualify, as it is not an independent act that is sufficiently removed from the primary illegality to qualify as *intervening*.

¶47 The attenuation factors articulated by the Supreme Court also seem to cut in the same direction. First, consideration of the "temporal proximity of the arrest and the confession," *Brown*, 422 U.S. at 603, reinforces the centrality of proximate cause analysis. If an extended time lapse is a plus factor for attenu-

ation—as it clearly is as the test has been formulated—the focus must necessarily be on independent acts removed from the primary act of police misconduct. Indeed, applying this factor to the discovery of an independent warrant would turn the inquiry on its head. In the context of an unlawful detention followed by a warrants check, temporal delay would logically count in favor of the government. The constitutional violation in a *Terry* stop, after all, is a product of the unreasonable delay associated with an individual's detention by the government. *See United States v. Sharpe*, 470 U.S. 675, 686 (1985). So the government could hardly assert the lack of "temporal proximity" in the discovery of a search warrant as a basis for attenuation (and thus avoidance of the exclusionary rule).

¶48 Second, the *Brown* Court's formulation of the "purpose and flagrancy" factor is also ill-suited to the outstanding warrant scenario. In *Brown*, the Court's application of this factor was focused on the "manner in which [the defendant's] arrest was affected," with particular attention to whether that "manner" gave "the appearance of having been calculated to cause surprise, fright, and confusion." 422 U.S. at 605. This, again, is an outgrowth of the inquiry into proximate causation, as a purposeful attempt at "surprise, fright, and confusion" could predictably yield a confession that would be entirely foreseeable (and thus connected to—and hardly independent of—the primary police misconduct). And that assessment

would have little application to the outstanding warrant scenario, where "surprise, fright, and confusion" are utterly irrelevant.

¶49 These are indications that the Supreme Court's attenuation doctrine is directed only at intervening circumstances involving a defendant's independent acts of free will (such as a confession and perhaps a consent to search). An even stronger signal appears in the terms of a parallel doctrine, the inevitable discovery exception. As noted above, this exception exempts from exclusion evidence that is the but-for result of police misconduct but that also would inevitably have been produced by untainted police work. *See Nix v. Williams*, 467 U.S. 431, 448–50 (1984). This doctrine is directly implicated in a case like this one, involving two parallel acts of police work—one a violation of the Fourth Amendment (detention without reasonable suspicion) and the other perfectly legal (execution of an outstanding arrest warrant). *See State v. Topanotes*, 2003 UT 30, ¶ 22, 76 P.3d 1159 (holding, in a case involving an unlawful detention leading to the discovery of an outstanding warrant, that evidence uncovered in a search incident to arrest on the warrant did not qualify under the inevitable discovery exception and thus was subject to suppression). And extension of the attenuation doctrine to the outstanding warrant scenario would eviscerate the inevitable discovery exception.

¶50 That prospect is troubling. Ordinarily, where lawful police work runs in tandem with an illegal parallel, the taint of the latter is tough to eliminate. Under *Nix*, our law does not lightly excuse an initial Fourth Amendment violation on the ground that it was paralleled by a lawful investigation. Instead we insist on exclusion unless the fruits of the lawful investigation would *inevitably* have come about regardless of the unlawful search or seizure. That approach would require exclusion in this case, as our decision in the *Topanotes* case indicates. *See Topanotes*, 2003 UT 30, ¶ 20–21. Granted, Strieff was lawfully arrested on an outstanding arrest warrant, and a search incident to arrest was thus also perfectly appropriate.[12] But given that that arrest and search came about as a but-for result of his unlawful detention, exclusion would still be required under *Nix* unless the contraband he possessed would *inevitably* have been discovered in the absence of the threshold unlawful detention. And such a showing would be difficult at best in a case like this one, as we cannot know whether Strieff might ultimately have had this contraband in his possession on any future date on

---

[12] For this reason the professed concern about the lawfulness of the *arrest* on the outstanding warrant, *see Green v. United States*, 111 F.3d 515, 521 (7th Cir. 1997), is a red herring. The exclusionary rule (with its attendant exceptions) is about exclusion of evidence. No one is contesting—or even could reasonably contest—the arrest on the outstanding warrant.

which he may have been arrested on the outstanding warrant.

¶51 Extension of the attenuation doctrine to this scenario would blur the lines of the inevitable discovery exception. If attenuation is a free-wheeling doctrine unmoored from voluntary acts of a defendant's free will, then the limits of the *Nix* formulation of inevitable discovery would be substantially curtailed. If *Brown*, and not *Nix*, prescribes the standard for *lawful* police conduct removing the taint from *unlawful* acts, then *inevitability* would no longer be the standard. Instead, it would be enough for the prosecution to assert that an initial act of police misconduct was insufficiently "purposeful and flagrant" and lacking in "temporal proximity" to a lawful investigation to sustain exclusion.

¶52 No court has yet extended the attenuation doctrine this far. To date, the courts that have deemed the *Brown* factors to apply to the outstanding warrant scenario seem to treat a search incident to an arrest on an outstanding warrant as a unique form of lawful police work. But there is no logical reason to treat such a search any differently from any other form of police work. So the logic of the decisions extending *Brown* to the outstanding warrant scenario will, if taken seriously, ultimately swallow the inevitable discovery exception.

¶53 And even if these decisions are not taken to their logical end, the resulting legal landscape (as it

currently stands in many jurisdictions) is untenable. Under the prevailing law in an increasing number of jurisdictions, one form of lawful police work (a search incident to an arrest on an outstanding warrant) is favored above all others (such as the completion of an outstanding investigation, as in *Nix*). This is equally problematic. A search incident to arrest on an outstanding warrant has no favored status under the Fourth Amendment. It is entirely arbitrary to subject most lawful police work (pursued in tandem with *unlawful* activity) to the high bar of inevitable discovery while lowering the bar for arrests incident to an outstanding warrant.

¶54 We cannot adopt this premise without overriding the *Nix* formulation of the inevitable discovery exception. And because we construe the *Brown* formulation of attenuation to be limited to cases involving a defendant's independent acts of free will, we deem the attenuation doctrine inapplicable here, and reverse the court of appeals on that basis. We therefore hold that Strieff was entitled to suppression of the evidence secured in the search incident to his arrest in this case, as the attenuation doctrine advanced by the State in opposition to that motion was not a viable exception to the exclusionary rule in this case.

IV. Conclusion

¶55 The terms and conditions of the exclusionary rule have been meted out by the Supreme Court in a

piecemeal, common-law fashion.[13] On matters not yet addressed by that Court, the lower courts are left to fill in the gaps. This case implicates a gap of substantial significance. And the courts that have addressed it have come to substantially different conclusions.

¶56 The confusion, in our view, stems from a threshold misunderstanding of the scope of attenuation. Thus, the reason the courts have struggled to arrive at a consensus formulation of attenuation as applied to the outstanding warrant scenario is that the doctrine has no application in this circumstance. In the absence of guidance from the United States Supreme Court, courts such as ours are left with only tea leaves. We are mindful, in today's effort to fill this gap in Fourth Amendment law, of the distinct doctrines of attenuation and inevitable discovery. To preserve the analytical distinction between the two, attenuation should be limited to cases involving intervening acts of a defendant's free will. That holding, which we adopt today, avoids the analytical dilemmas that are currently troubling the lower courts (as to whether an outstanding warrant is of "compelling" or "minimal" importance, as to the significance of the "temporal proximity" factor, and as to the ap-

---

[13] *See* Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on* Terry *"Stop and Frisk"*, 50 OKLA. L. REV. 451, 460 (1997).

plication of the "purpose and flagrancy" factors). Ultimately, the United States Supreme Court may chart a different course. Such is its constitutional prerogative. Ours is to make sense of and apply existing precedent, to fill in gaps by reading any and all tea leaves available to us.

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah,	)	OPINION
	)	
Plaintiff and Appellee,	)	Case No. 20100541-CA
	)	
v.	)	FILED
	)	(August 30, 2012)
Edward Joseph Strieff Jr.,	)	
	)	2012 UT App 245
Defendant and Appellant.)		

Third District, Salt Lake Department, 071900011

The Honorable Michele M. Christiansen

Attorneys: Elizabeth A. Lorenzo and Robert K. Engar, Salt Lake City, for Appellant

Mark L. Shurtleff and Jeffrey S. Gray, Salt Lake City, for Appellee

---

Before Judges Voros, Thorne, and Roth.

ROTH, Judge:

¶1 Edward Joseph Strieff Jr. appeals from his convictions for attempted possession of a controlled substance and possession of drug paraphernalia. Strieff contends that the district court erroneously denied his motion to suppress the evidence underlying these

convictions by applying an intervening circumstances exception not recognized by Utah law or the Utah Constitution. Because we conclude that the district court applied the proper test and correctly denied the motion to suppress, we affirm.

BACKGROUND

¶2 After receiving an anonymous tip that drug activity was occurring at a home in South Salt Lake, Utah, Officer Doug Fackrell conducted intermittent surveillance of the home for approximately three hours over a one-week period. In the course of his surveillance, Officer Fackrell observed short-term traffic at the house, which in his experience was consistent with drug sales activity. Consequently, Officer Fackrell decided he needed to "find out what was going on [in] the house."

¶3 Officer Fackrell then saw Strieff leave the home on foot. Although he had not witnessed Strieff's arrival at the house, Officer Fackrell believed, based on his observations of other short-term traffic at the location, that Strieff was a short-term visitor who might be involved in drug activity, so he followed Strieff in his unmarked vehicle. When Strieff approached a 7-Eleven, Officer Fackrell pulled alongside him, stepped out of his vehicle, and identified himself as a police officer. The officer then asked Strieff what he had been doing at the house. Officer Fackrell also requested identification, and Strieff produced an identification card, which the officer re-

tained while he ran a warrants check. That inquiry revealed a "small traffic warrant." As a result, Officer Fackrell arrested Strieff and, in the course of conducting a search incident to the arrest, discovered "a white crystal substance" that "tested positive for methamphetamine," "a small green plastic scale" covered with a "white powder residue," and a glass pipe. Strieff was subsequently charged with unlawful possession of a controlled substance and possession of drug paraphernalia.

¶4 Strieff moved to suppress the methamphetamine and paraphernalia evidence, asserting that it had been obtained as the result of an illegal seizure. The State conceded that Officer Fackrell had illegally detained Strieff[1] but argued that the evidence was nevertheless admissible because it "was discovered during a search incident to a lawful warrant-arrest. .

---

[1] The parties agree that Officer Fackrell's detention of Strieff was a level two encounter that required reasonable, articulable suspicion that Strieff was engaged in criminal wrongdoing. *See generally State v. Hansen*, 2002 UT 125, ¶ 35, 63 P.3d 650 (recognizing three levels of encounters between police and the public and stating that a level two detention requires the officer to have "'specific and articulable facts and rational inferences [that] give rise to a reasonable suspicion a person has [committed] or is committing a crime'" (quoting *United States v. Werking*, 915 F.2d 1404, 1407 (10th Cir. 1990))). The State has conceded that Officer Fackrell lacked the required degree of suspicion, and, for purposes of this decision, we assume that the initial detention was unlawful.

[and therefore] was not a product of the initial detention." *See generally Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (stating that "the more apt question" in determining whether evidence obtained from "the illegal actions of the police" should be suppressed is "whether, granting establishment of the primary illegality, the evidence has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint"); *State v. Arroyo*, 796 P.2d 684, 690 n.4 (Utah 1980) (employing a three-part test for determining whether evidence is obtained through exploitation of an illegal search or seizure, which requires consideration of the temporal proximity between the discovery of the evidence and the initial illegality, the presence or absence of intervening circumstances, and the purpose and flagrancy of the officer's misconduct).

¶5 The district court agreed with the State, concluding that although the illegal seizure and the search occurred in quick succession and their temporal proximity therefore weighed in favor of suppression, an intervening circumstance—the discovery of the warrant—and the officer's lack of purposefulness and flagrancy in detaining Strieff weighed against exclusion of the evidence. The district court concluded that, on balance, the attenuation factors supported a determination that the discovery of the evidence was not a result of exploitation of the initial illegality and denied Strieff's motion to suppress.

Strieff entered conditional guilty pleas[2] to attempted possession of a controlled substance and possession of drug paraphernalia. He now appeals, asserting that the district court applied a test not recognized by Utah law to deny his motion to suppress.

ISSUE AND STANDARD OF REVIEW

¶6 Strieff recognizes that both the United States Supreme Court and the Utah Supreme Court have applied the attenuation doctrine for the purpose of assessing whether evidence obtained during a search or seizure conducted in violation of the Fourth Amendment must be suppressed or whether it is sufficiently separate from the initial illegality to be purged of any taint. *See Wong Sun*, 371 U.S. at 487–88; *Arroyo*, 796 P.2d at 690 n.4. Strieff contends, however, that in considering the warrant as an intervening circumstance, the district court went beyond the bounds of the attenuation doctrine as it has been recognized under Utah law.[3] We review the

---

[2] A conditional guilty plea reserves the defendant's right to appeal a denial of a motion to suppress and "allows withdrawal of the plea if [the] defendant's arguments in favor of suppression are accepted by the appellate court." *State v. Sery*, 758 P.2d 935, 938 (Utah Ct. App. 1988).

[3] Strieff purports to raise a challenge under both the Fourth Amendment to the federal constitution and its state constitution counterpart, article 1, section 14. While Strieff effectively develops the general notion that Utah courts have recognized that article 1, section 14 can provide greater protec-

(continued)

district court's denial of a motion to suppress for correctness. *See State v. Tripp*, 2010 UT 9, ¶ 23, 227 P.3d 1251. We likewise review the court's interpretation of precedent in reaching its decision to suppress for correctness. *See generally Ellis v. Estate of Ellis*, 2007 UT 77, ¶ 6, 169 P.3d 441 (stating the standard for reviewing the district court's interpretation of precedent).

---

tion than the Fourth Amendment, his criticism of the district court's attenuation analysis relies on Utah cases addressing application of the attenuation doctrine only in the context of the federal constitution. *See, e.g.*, *State v. Thurman*, 846 P.2d 1256 (Utah 1993); *State v. Arroyo*, 796 P.2d 684 (Utah 1990); *State v. Newland*, 2010 UT App 380, 253 P.3d 71. And neither those cases, nor any other Utah cases discussing the attenuation doctrine, suggest that its application would differ under the state constitution. Furthermore, Strieff does not explain how the state constitution might provide broader or different protections in this context than does the federal constitution. Strieff's claim is therefore more accurately viewed as a contention that the district court failed to properly apply the attenuation doctrine as it has been adopted by the Utah courts. Consequently, we must decline Strieff's invitation to separately analyze the attenuation doctrine under article I, section 14 of the Utah Constitution. *See generally State v. Van Dyke*, 2009 UT App 369, ¶ 17 n.4, 223 P.3d 465 (declining to engage in an independent analysis under the state constitution when the defendant did not supply any legal analysis or authority).

ANALYSIS

I. *State v. Topanotes*

¶7 As a threshold matter, we address Strieff's contention that the methamphetamine and paraphernalia evidence discovered by Officer Fackrell following the warrant arrest must be suppressed under the reasoning of the Utah appellate courts in *State v. Topanotes*, 2003 UT 30, 76 P.3d 1159, and a number of other cases. Unlike the dissent, we are not persuaded that *Topanotes* is controlling authority in this case. But, because of the similarity of the facts between the two cases and the dissent's thoughtful discussion of *Topanotes*, we engage in a separate analysis to explain how we distinguish it from the case before us.

¶8 The Fourth Amendment protects against unreasonable searches and seizures. *See* U.S. Const. amend. IV. The exclusionary rule is a judicial remedy that renders "evidence obtained by searches and seizures in violation of the Constitution . . . inadmissible in state court." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The exclusionary rule is not absolute, however; evidence seized as a result of an illegal search or seizure may be admissible under three "closely related but analytically distinct" exceptions: independent source, inevitable discovery, and attenuation. *See United States v. Terzado-Madruga*, 897 F.2d 1099, 1113 (11th Cir. 1990). Under the independent source doctrine, challenged evidence is ad-

missible despite the constitutional violation "if it derived from a lawful source independent of the illegal conduct." *Id.* The inevitable discovery doctrine is an extension of the independent source doctrine and deems admissible evidence discovered during an illegal search or seizure "if it inevitably or ultimately would have been discovered by lawful means without reference to the police misconduct." *Id.* And the attenuation doctrine considers whether the "causal connection between the constitutional violation and the discovery of the evidence has become so attenuated as to dissipate the taint" of the initial illegality, making suppression unnecessary as a deterrent. *Id.*

¶9 Although *Topanotes* is nearly factually identical to the present case,[4] the Utah Supreme Court was analyzing whether drug evidence discovered pursuant to arrest on a warrant discovered following an illegal detention could be admitted under the inevitable discovery doctrine, not the attenuation doctrine. The dissent places emphasis on the "closely related" aspect of the relationship between the three exceptions, noting that it was unlikely that the "Utah Supreme Court would have allowed the evidence discovered in [*Topanotes*] if only the State had urged the attenuation doctrine instead of the 'closely related' inevitable discovery doctrine." *See infra* ¶

---

[4] For a fuller discussion of the factual similarities between the two cases, see the dissenting opinion at paragraph 43.

56 (quoting *Terzado-Madruga*, 897 F.2d at 1113). However closely related these doctrines are, they are nevertheless "analytically distinct," and we believe that our treatment of the warrant discovery in this case as an issue of first impression under the attenuation doctrine is therefore justified. *Compare Topanotes*, 2003 UT 30, ¶ 16 (noting that "[a] crucial element of inevitable discovery is independence; there must be some 'independent basis for discovery'" (citation omitted)), *with State v. Newland*, 2010 UT App 380, ¶¶ 9, 11, 253 P.3d 71 (requiring a causal connection between the initial illegality and the challenged evidence for application of the attenuation doctrine and focusing on whether the evidence is obtained "'by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint'" (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963))).

¶10 Indeed,

> [t]he inevitable discovery doctrine allows the admission of evidence that was seized illegally if it would have been seized legally eventually. . . In contrast, the attenuation doctrine admits evidence that is obtained with the authority of law provided that the evidence was not come at by the exploitation of a prior illegal act.

State v. Eserjose, 259 P.3d 172, 183 (Wash. 2011) (en banc) (emphasis and internal quotation marks omit-

ted). Using the inevitable discovery doctrine, courts therefore consider whether, given the facts and circumstances surrounding the discovery of evidence, the police would have discovered the evidence anyway in the absence of the initial illegality. *See Topanotes*, 2003 UT 30, ¶ 14. In such a case, the exclusionary rule is deemed inapplicable because "[t]he causal chain between the illegality and the discovered evidence [would have been] broken [by] the evidence [being] . discovered through independent and lawful activity—in other words through an independent source." *State v. Worwood*, 2007 UT 47, ¶ 43, 164 P.3d 397 (internal quotation marks omitted); *see also Nix v. Williams*, 467 U.S. 431, 459 (1984) (Brennan, J., dissenting) (noting that the inevitable discovery exception is a corollary of the independent source doctrine that requires a "hypothetical finding" that the evidence would have been discovered *despite* the illegality). If the evidence would not *necessarily* have been discovered, then it must be excluded to effect the primary purpose of the exclusionary rule: to deter unconstitutional police conduct. *See Topanotes*, 2003 UT 30, ¶ 19 ("Allowing the evidence [where it might not have been discovered absent the illegality] would provide no deterrent at all to future unlawful detentions."). With the attenuation doctrine, however, the illegality is not disregarded but instead is the lens through which the discovery of the evidence must be examined in order to determine whether suppression is appropriate. *See generally*

State v. Arroyo, 796 P.2d 684, 690 n.4 (Utah 1990) (identifying temporal proximity, intervening circumstances, and purpose and flagrancy of the officer's conduct as the factors a court must consider in determining whether the discovery of evidence is attenuated from the initial illegality). This is because the "attenuation analysis does not apply . . absent an initial finding of at least *some* causal connection between the illegality and the testimony." *Terzado-Madruga*, 897 F.2d at 1116. Thus, "[e]ven if the illegality is the 'but for' reason for the evidence's discovery, it should still be admitted if it is sufficiently attenuated to dissipate the taint of the illegality." *Worwood*, 2007 UT 47, ¶ 44 (internal quotation marks omitted). Under this analysis, the degree to which the initial illegality was purposeful and flagrant and the degree to which the mechanism that led to discovery of the evidence (e.g., an apparently voluntary statement or consent to search or, as here, the discovery of an arrest warrant) was affected by the initial illegality are considered together in order to determine whether the evidence was so tainted that it ought to be suppressed. *See infra* ¶¶ 22, 30–33.

¶11 Which exclusionary rule exception is being applied not only affects how a court views the circumstances surrounding the illegality but might also result in the development of a factual record with a different focus on what is relevant, i.e., where certain facts are added or omitted or are given more or less

attention and weight. For example, in an inevitable discovery case, the court focuses on what would have happened if the police misconduct had not occurred. The purpose and flagrancy with which the officer acted—the central component of an attenuation analysis—is therefore of little, if any, consequence because the facts are viewed in a light where the illegality is disregarded. Indeed, the purpose and flagrancy of the officer's conduct in *Topanotes* is not even mentioned, much less assessed. In an attenuation analysis, on the other hand, the circumstances surrounding the illegality and discovery of evidence are at the heart of the inquiry, and little emphasis is placed on what might have occurred if the officer had not illegally seized or searched the defendant. Thus, although both exceptions strive to temper the harsh consequences of the exclusionary rule in circumstances where police misconduct is unlikely to be deterred by suppression, they employ "analytically distinct" methods for assessing whether apparently "tainted" evidence has been sufficiently cleansed. *See, e.g., United States v. Fialk*, 5 F.3d 250, 251 (7th Cir. 1993) (declining to consider the attenuation doctrine when the government argued only inevitable discovery despite the attenuation doctrine being "better fitted" to the facts of the case); *Terzado-Madruga*, 897 F.2d at 1113, 1116 (admitting evidence pursuant to the inevitable discovery and independent source doctrines but not the attenuation doctrine). Because the analytical approaches of the

inevitable discovery and the attenuation doctrines are sufficiently distinct, we do not believe that *Topanotes*, which evaluates the admissibility of evidence discovered pursuant to a warrant arrest under the inevitable discovery doctrine, constrains our analysis under the separate attenuation doctrine.[5]

II. Attenuation Analysis

¶12 In the case before us, the district court applied an attenuation analysis to reach its conclusion that the evidence found in the search incident to arrest was admissible despite the unconstitutional stop

---

[5] Strieff has directed us to a number of other cases in which evidence discovered during the search incident to an arrest on a valid warrant was suppressed. *See State v. Johnson*, 805 P.2d 761, 764 (Utah 1991); *State v. Swanigan*, 699 P.2d 718, 719 (Utah 1985) (per curiam); *State v. Chism*, 2005 UT App 41, ¶ 22, 107 P.3d 706; *State v. Valdez*, 2003 UT App 100, ¶¶ 20–21, 68 P.3d 1052; *State v. Sykes*, 840 P.2d 825, 829 (Utah Ct. App. 1992); *State v. Hansen*, 837 P.2d 987, 989 (Utah Ct. App. 1992); *State v. Munsen*, 821 P.2d 13, 16 (Utah Ct. App. 1991). None of these cases, however, involve an analysis of any of the exceptions to the exclusionary rule. Rather, they seem to support a conclusion that the determination of the admissibility of evidence after an initial illegality can vary depending on the legal theory that is applied. As we have noted, the independent source, inevitable discovery, and attenuation doctrines are often applied in factually analogous situations, but because they each focus on the facts from somewhat different legal perspectives, their results may differ.

that led to the discovery of the warrant.[6] "In cases involving the admissibility of evidence obtained as a consequence of police misconduct, the United States Supreme Court has eschewed a 'but for' test" in favor of the more nuanced attenuation analysis. *State v. Arroyo*, 796 P.2d 684, 688 (Utah 1990).

> We need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Wong Sun, 371 U.S. at 487–88. Thus, application of the rule must take into account its underlying justifications: the "exclusionary principle is driven by dual 'considerations of deterrence and of judicial integrity.'" *State v. Grayson*, 336 S.W.3d 138, 147 (Mo. 2011) (en banc) (quoting *Brown v. Illinois*, 422 U.S. 590, 599 (1975)). In this regard,

---

[6] The State has not argued for the evidence's admissibility under the inevitable discovery or independent source doctrines.

> [the exclusionary rule's] purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. But [d]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons.

Brown, 422 U.S. at 599–600 (second alteration in original) (internal quotation marks omitted). When a warrant is discovered during the course of an illegal detention, as was the case here, "any analysis to determine whether the evidence seized . . should be suppressed must involve a balancing of the mutual concerns of discouraging police conduct that results in the illegal detention of a citizen, while recognizing the legitimate interest of the state in enforcing outstanding arrest warrants." *State v. Frierson*, 926 So. 2d 1139, 1145–46 (Fla. 2006) (Anstead, J., concurring). Hence, where a warrant discovered after an initial illegality leads to the discovery of evidence of a crime, the underlying principle of the attenuation doctrine must be taken into account in determining whether that evidence ought to be suppressed: "'The notion of the "dissipation of the taint" attempts to [mark] the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost . . . [, i.e.,] to mark the point

of diminishing returns of the deterrence principle.'" *McBath v. State*, 108 P.3d 241, 248–49 (Alaska Ct. App. 2005) (first alteration and omission in original) (quoting 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.4(a) (4th ed. 2004)).

¶13 The United States Supreme Court and the Utah Supreme Court have applied a three-part test to determine whether evidence obtained following an unconstitutional police action is sufficiently attenuated from the initial illegality to dissipate any taint. This attenuation analysis requires the court to analyze and balance three factors: "[t]he temporal proximity of the [unlawful detention] and the [search], the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." *Brown*, 422 U.S. at 603–04 (citation and footnotes omitted); *accord State v. Arroyo*, 796 P.2d at 690 n.4.

A. The District Court Applied the Correct Attenuation Test.

¶14 Strieff contends that the district court failed to properly apply this three-part attenuation analysis, instead adopting a novel intervening circumstances exception from *United States v. Green*, 111 F.3d 515 (7th Cir. 1997), that permits a district court to treat the discovery of an outstanding warrant as conclusive evidence of attenuation. The encounter in *Green* began with two police officers driving behind a blue

Chevrolet that one of them recognized as having been parked the night before in front of a house belonging to a felon wanted on warrants. *See id.* at 517. The officers thought that the felon might be in the car or that, at the very least, the occupants might know where he was. *See id.* When the vehicle pulled into a driveway, the officers blocked its exit with their car, a move the Seventh Circuit later determined had resulted in the unconstitutional seizure of both its occupants. *See id.* at 517, 520. The officers discovered a warrant for the passenger in the course of confirming his identification. *See id.* at 517 A search of the vehicle incident to the passenger's arrest yielded crack cocaine and a gun belonging to the driver. *See id.* The officers then arrested the driver. *See id.* The driver moved to suppress the evidence, asserting that it was discovered as the result of a search tainted by the illegal seizure. *See id.* The district court disagreed, and the Seventh Circuit affirmed the denial of the driver's motion to suppress. *See id.* at 517–18.

¶15 According to Strieff, while the Seventh Circuit "ostensibly appl[ied] the [attenuation] factors to the facts in *Green*," the court actually "created what it termed the 'intervening circumstances exception,'" under which the discovery of a warrant automatically attenuates an illegal seizure from evidence discovered in the search incident to arrest. Although Strieff is correct that *Green* does refer to a warrant-focused "intervening circumstances exception," *see*

id. at 522–23, we do not read the decision as elevating the discovery of a warrant to a supervening circumstance that eliminates any attenuation analysis. Rather, the *Green* court considered all three prongs of the attenuation analysis and decided that, on balance, they weighed against exclusion. *See id.* at 521–23 (noting that although the illegal stop and the search were temporally proximate, the warrant constituted an intervening circumstance and the record did not reveal any bad faith on the part of the officers because, though inappropriate, "the purpose of the stop was not to seek evidence against the [occupants]" or "to search the automobile"). Its description of the rationale behind its decision to admit the evidence as an "intervening circumstance exception" therefore appears to be a form of shorthand used to describe a circumstance where the presence of a warrant tipped the balance against suppression.[7]

---

[7] Some courts have employed a warrant-focused intervening circumstances exception in the manner Strieff contends that *Green* did, that is, by treating the discovery of a warrant as an independently sufficient basis to deny suppression in the face of an initial illegality. None of them relied on *Green* as a basis for such a decision, however. *See, e.g.*, *State v. Cooper*, 579 S.E.2d 754, 758 (Ga. Ct. App. 2003) (stating, without regard for the temporal proximity or the nature of the officers' misconduct, that the officers' intervening discovery of a warrant and arrest of the defendant attenuated the link between the illegal detention and the evidence obtained); *State v.*

(continued)

¶16 Indeed, the district court in the case before us did not appear to rely on *Green* as the source of a new one-step approach that treated discovery of a warrant as a per se basis for denying the motion to suppress, as Strieff claims it did. Rather, the court employed the three-part attenuation analysis adopted by the Utah Supreme Court. In its findings of fact, conclusions of law, and order denying Strieff's motion to dismiss, the district court identified the three factors of the attenuation analysis and then separately considered each, assessing the relevant evidence and making a determination about whether that factor weighed for or against suppression. Although the court concluded that an arrest warrant constitutes an intervening circumstance, it did not

---

Thompson, 438 N.W.2d 131, 137 (Neb. 1989) (determining, without considering the other two factors, that the immediate discovery of a warrant for the defendant attenuated the taint of the illegal stop and the identification of the defendant as a robbery suspect in a subsequent lineup); *cf. State v. Walker-Stokes*, 180 Ohio App. 3d 36, 2008-Ohio-6552, 903 N.E.2d 1277, at ¶ 40 ("[B]ecause as a matter of law, an outstanding arrest warrant operates to deprive its subject of the reasonable expectation of privacy the Fourth Amendment protects, the exclusionary rule does not apply to the search and seizure of that subject that would otherwise be illegal " (emphasis omitted)). *But see State v. Gardner*, 2d District No. 24308, 2011-Ohio-5692, at ¶¶ 37–38 (explaining that the discovery of the warrant must be "removed, unrelated, unforseen, and independent from the unlawful stop and seizure" for the evidence to be admissible), *appeal allowed*, 131 Ohio St. 3d 1483 (Ohio Mar. 21, 2012).

give this factor dispositive weight. Instead, the court, "[w]eighing the factors in their totality," determined "suppression to be an inappropriate remedy" because "Officer Fackrell did not exploit the initial unlawful detention to search [Strieff]s person." While the district court noted that Officer Fackrell "did not cause and could not have anticipated" the arrest warrant, we do not read this statement to indicate that the court believed that the warrant was sufficient on its own to attenuate the initial illegal detention from the methamphetamine and paraphernalia discovered during the search. Rather, it appears that the court considered the discovery of the warrant to be an intervening circumstance that did not arise as the result of purposeful or flagrant conduct by the officer and therefore provided a basis for the search that was not an exploitation of the illegal detention. In other words, in the district court's view, Officer Fackrell did not deliberately detain Strieff in violation of his constitutional rights in the hope of turning up a warrant that would then justify a search. Because we conclude that the district court employed the correct attenuation test, the question remaining is whether the court properly analyzed the three required factors and reached an appropriate conclusion.

B. The District Court Carried Out an Appropriate Attenuation Analysis.

¶17 In making its decision to deny Strieff's motion to suppress, the district court analyzed each of the required factors in the attenuation analysis and properly weighed and balanced them. We discuss each factor in turn.

1. Temporal Proximity

¶18 Neither party takes issue with the district court's finding that the time between Officer Fackrell's initial stop of Strieff and the search incident to arrest was "relatively short." Close temporal proximity generally favors suppression. *See State v. Shoulderblade*, 905 P.2d 289, 293 (Utah 1995) ("A brief time lapse between a Fourth Amendment violation and [the evidence obtained] often indicates exploitation because the effects of the misconduct have not had time to dissipate."). However,

> [u]nlike the intervening circumstances and the purpose and flagrancy factors, . . temporal proximity does not directly address the relationship between the police misconduct and the . . search but rather is a circumstance surrounding these events. As a result, its relative probative value expands and contracts depending on the particular facts of any given case.

State v. Newland, 2010 UT App 380, ¶ 14, 253 P.3d 71 (citation and internal quotation marks omitted). Here, the proximity between the illegal detention and the search was short because Officer Fackrell quickly became aware of a pending warrant, placed Strieff under arrest, and searched him incident to that arrest. The significance of that warrant as an intervening circumstance will ultimately affect how we view the relative weight of temporal proximity in this case. Thus, while the temporal proximity factor appears to weigh in favor of suppression, its effect on the overall balance among the factors must be assessed within the broader factual context.

2. Intervening Circumstances

¶19 The significance of a subsequently-discovered arrest warrant in attenuating the taint of an illegal detention presents an issue of first impression in Utah.

> Case law from other state and federal courts[, however,] uniformly holds that the discovery of an outstanding arrest warrant prior to a search incident to arrest constitutes an intervening circumstance that may—and, in the absence of purposeful or flagrant police misconduct, will—attenuate the taint of the antecedent unlawful [detention].

People v. Brendlin, 195 P.3d 1074, 1076 (Cal. 2008) (emphasis omitted).[8]

---

[8] The California Supreme Court concludes that the jurisdictions that have considered the issue have universally treated the discovery of an arrest warrant as an intervening circumstance. Our independent research supports that conclusion, as none of the cases we have located from jurisdictions that have addressed this question appear to have adopted a contrary rule. *See, e.g., United States v. Gross*, 662 F.3d 393, 404 (6th Cir. 2011); *United States v. Simpson*, 439 F.3d 490, 495–96 (8th Cir. 2006); *United States v. Green*, 111 F.3d 515, 522 (7th Cir. 1997); *McBath v. State*, 108 P.3d 241, 248 (Alaska Ct. App. 2005); *State v. Hummons*, 253 P.3d 275, 278 (Ariz. 2011); *People v. Brendlin*, 195 P.3d 1074, 1080 (Cal. 2008), *cert. denied*, 129 S. Ct. 2008 (2009); *People v. Hillyard*, 589 P.2d 939, 941 (Colo. 1979) (en banc), *questioned in dicta by People v. Padgett*, 932 P.2d 810, 816 (Colo. 1997) (en banc), *discussed by People v. Martinez*, 200 P.3d 1053, 1055 n.1 (Colo. 2009) (en banc) (recognizing tension between *Hillyard* and dicta in *Padgett* but neither "address[ing] nor resolv[ing] th[at] tension"); *State v. Frierson*, 926 So. 2d 1139, 1144 (Fla. 2006), *cert. denied*, 549 U.S. 1082 (2006); *State v. Cooper*, 579 S.E.2d 754, 758 (Ga. Ct. App. 2003); *State v. Page*, 103 P.3d 454, 459–60 (Idaho 2004); *People v. Mitchell*, 824 N.E.2d 642, 649 (Ill. App. Ct. 2005); *State v. Martin*, 179 P.3d 457, 462–63 (Kan. 2008), *cert. denied*, 555 U.S. 880 (2008); *Hardy v. Commonwealth*, 149 S.W.3d 433, 436 (Ky. Ct. App. 2004); *State v. Hill*, 97-2551, p. 8–9 (La. 11/6/98); 725 So. 2d 1282, 1287; *Cox v. State*, 916 A.2d 311, 323 (Md. 2007); *People v. Reese*, 761 N.W.2d 405, 412 (Mich. Ct. App. 2008); *State v. Grayson*, 336 S.W.3d 138, 147 (Mo. 2011) (en banc); *State v. Thompson*, 438 N.W.2d 131, 137 (Neb. 1989); *State v. Shaw*, 2011 WL 2622375, *5 (N.J. Super. Ct. App. Div. 2011) (per curiam), *cert. granted*, 34 A.3d 783 (N.J. 2011); *State*

(continued)

¶20 To determine what role a subsequently-discovered warrant should play in an attenuation analysis under Utah law, we must first decide what constitutes an intervening circumstance. "Intervening circumstances are events that create a clean break in the chain of events" leading to the discovery of incriminating evidence. *Newland*, 2010 UT App 380, ¶ 15. "Typically, the intervening circumstance which dissipates the taint involves a voluntary act by the defendant, such as the voluntary confession or consent to search given after an illegal search or sei-

---

v. Soto, 2008-NMCA-032, ¶¶ 26–27, 143 N.M. 631, 179 P.3d 1239, *cert. granted*, 143 N.M. 667 (N.M. Feb. 28, 2008) (No. 30,894), *cert. quashed*, 146 N.M. 728 (N.M. 2009); *Gardner*, 2011-Ohio-5692, at ¶ 37; *Jacobs v. State*, 2006 OK CR 4, ¶¶ 8–11, 128 P.3d 1085, 1088–89; *Reed v. State*, 809 S.W.2d 940, 947 (Tex. Ct. App. 1991); *cf. State v. Rothenberger*, 440 P.2d 184, 185–86 (Wash. 1968) (concluding that the causal link between a purportedly illegal arrest and discovery of evidence was broken by an outstanding warrant under the related independent source doctrine).

The Indiana Court of Appeals, however, has a split of authority that has not yet been reconciled, with one appellate court recognizing the discovery of a warrant as an intervening circumstance and another rejecting that approach. *Compare Quinn v. State*, 792 N.E.2d 597, 600–01 (Ind. Ct. App. 2003) (considering the warrant to be an intervening circumstance), *with Sanchez v. State*, 803 N.E.2d 215, 222–23 (Ind. Ct. App. 2004) (distinguishing *Quinn* and declining to treat the warrant as an intervening circumstance), *cert. denied*, 812 N.E.2d 804 (Ind. 2004).

zure." *United States v. Green*, 111 F.3d 515, 522 (7th Cir. 1997); *cf. United States v. Bailey*, 691 F.2d 1009, 1017–18 (11th Cir. 1982) ("[T]he police may legally arrest a defendant for a new, distinct crime, even if the new crime is in response to police misconduct and causally connected thereto."); *State v. Earl*, 2004 UT App 163, ¶¶ 24–25, 92 P.3d 167 (concluding that by giving a false name and birth date, the defendant committed the crime of false identification, which constituted an intervening illegal act justifying arrest). Strieff encourages us to draw from this historical pattern a proscription on treating anything other than a voluntary act by the defendant as an intervening circumstance. But the focus of concern in determining whether evidence obtained following an illegal detention ought to be suppressed is not necessarily the nature of the intervening circumstance but rather on whether there is a sufficient separation between the initial illegality and the subsequent discovery of the evidence to attenuate the discovery of the evidence from the effects of the earlier police misconduct. *See Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963). Often the circumstance that intervenes is some apparently voluntary action by the person detained, but voluntariness is not a logically necessary constraint on the attenuation doctrine; rather, any event that effectively breaks the chain between the possibly coercive effects of the illegal stop on the free will of the person detained and the discovery of the evidence can serve the pur-

pose. Because the discovery of a warrant sets in motion a legal process that can be entirely independent of the lingering effects of the illegal stop, a warrant can be such an attenuating circumstance.

¶21 "The discovery of an outstanding arrest warrant informs the law enforcement officer that a magistrate has found there is probable cause to believe that a crime has been committed and that the person subject to the warrant has committed the crime." *State v. Moralez*, 242 P.3d 223, 231 (Kan. Ct. App. 2010), *review granted* (Kan. 2011). In other words, a warrant provides cause for an arrest based on facts separate from the illegal detention and on the judgment of an official removed from the immediate circumstances. *See Reed v. State*, 809 S.W.2d 940, 947 (Tex. Ct. App. 1991); *accord Jacobs v. State*, 2006 OK CR 4, ¶ 9, 128 P.3d 1085, 1089 ("[D]iscovery of outstanding warrants is a significant intervening event which gives police probable cause to arrest a defendant independent from an illegal stop and seizure."). Indeed, the court in *United States v. Green*, 111 F.3d 515 (7th Cir. 1997), reasoned that there is "less 'taint'" when an outstanding arrest warrant intervenes than when the intervening circumstance is the defendant's voluntary act. *See id.* at 522. This is because once a warrant is discovered, there is a legal basis for a search that does not require any choice by the defendant, such as in the case of a confession or consent to search, that could be influenced by the lingering effects of the initial illegality. *See id.* And

while an illegal stop might create a situation that could result in an actual crime, such as resisting arrest or disobeying a police command, for which the person detained could be legally arrested and searched, a search incident to arrest on an outstanding warrant does not stem from an act that may have been provoked by the initial illegal detention. *See id.* Put differently, when the officer does not conduct a search of the person until after the discovery of the warrant, "[t]he challenged evidence [i]s thus the fruit of the outstanding warrant, and [i]s not obtained through exploitation of the unlawful . . . stop." *See generally Brendlin*, 195 P.3d at 1080. For these reasons, we agree with the courts of other jurisdictions that a warrant is an intervening circumstance that ought to be considered in the attenuation analysis.[9]

---

[9] As Judge Thorne explains in his dissenting opinion, *see infra* ¶ 49 note 3, Utah courts have historically considered intervening circumstances involving events that occur after the initial police illegality and before the mechanism that leads to the discovery of the controverted evidence. In those cases, the evidence-producing mechanisms were volitional acts, such as a consent to search, a statement or confession, or the commission of a new crime. The dissent suggests that the warrant itself cannot be an intervening circumstance, as other jurisdictions have treated it, but rather is another type of mechanism by which evidence is discovered and is subject to taint by the initial illegality, unless there are circumstances that intervene to

(continued)

cleanse that taint. We believe that this criticism overlooks the function of the attenuation analysis in these circumstances.

In cases involving evidence-producing mechanisms that are volitional acts, the courts have necessarily been concerned with what circumstances might have intervened prior to the occurrence of the mechanism in order to be assured that the voluntary nature of the mechanism was not tainted by the initial illegality. Intervening circumstances, therefore, have traditionally included events that demarcate a separation between the defendant's voluntary act and any potential coercion stemming from the police misconduct, such as the passage of time (an indicator so effective in gauging the likelihood that the defendant's acts were truly the product of free will that it has taken its place as a separate factor in the attenuation analysis), a change of location, notification of the rights to remain silent or to consult an attorney, events that affect the dynamics of the relationship with law enforcement (such as an appearance before a magistrate, a release from custody, or retention of counsel), and so on. *See generally State v. Newland*, 2010 UT App 380, ¶ 15, 253 P.3d 71 (identifying some intervening circumstances).

But when the mechanism of discovery, by its nature, is not subject to the contaminating influence of unconstitutional police conduct, the taint analysis inherent in the temporal proximity and intervening circumstances factors becomes far less complicated. A warrant, for example, stands alone as a basis for an arrest and resulting search. Thus, the kind of intervening events (passage of time, notification of rights, release from custody, etc.) that are so important to assessing the validity of evidence-producing mechanisms that are the product of volitional acts are not particularly relevant. Hence, virtually all the attenuation cases in other jurisdictions refer to the discovery of a warrant as itself an "intervening circumstance" (as do we), simply recognizing that it establishes a valid basis for a

(continued)

¶22 The discovery of a warrant, however, cannot by itself dissipate the taint of an initial illegality because such a per se rule could "'create[] a new form of police investigation' by routinely illegally seizing individuals, knowing that the subsequent discovery of a warrant would provide after-the-fact justification for illegal conduct." *State v. Hummons*, 253 P.3d 275, 278 (Ariz. 2011) (alteration in original) (quoting *United States v. Gross*, 624 F.3d 309, 320–21 (6th Cir. 2010)). Thus, treating a warrant as an intervening circumstance does pose the potential for abuse, and we recognize that blanket exclusion of the evidence, the result Strieff urges us to adopt, would act as a deterrent to such conduct. The United States Supreme Court, however, has "never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." *Herring v. United States*, 129 S. Ct. 695, 700 (2009) (internal quotation marks omitted). Rather, "[t]o trigger the exclusionary rule, police conduct

---

search incident to arrest that is inherently independent from the police illegality and therefore not subject to its taint. *See, e.g., Simpson*, 439 F.3d at 495–96; *Brendlin*, 195 P.3d at 1080. In other words, the discovery of a warrant is likely to resolve the contamination question—which is really the central focus of the first two factors in the attenuation analysis—against suppression. As we discuss next, where a valid arrest warrant is the intervening circumstance, the third factor in the attenuation analysis, purpose and flagrancy, takes on the greatest importance in determining whether suppression is appropriate.

must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *See id.* at 702. We believe the purpose and flagrancy factor of the attenuation analysis ensures that courts strike an appropriate balance in warrant discovery situations between the benefits of deterrence of police misconduct and the cost to the justice system when pertinent evidence is excluded. Thus, the third attenuation factor, the "purpose and flagrancy of the official misconduct, dovetails with the [intervening circumstances] factor," and the "officers' reasons for detaining the subject and the flagrancy of the invasion on the subject's privacy" are critical to the weight to be accorded to the discovery of a warrant. *State v. Martin*, 179 P.3d 457, 463 (Kan. 2008).

3. Purpose and Flagrancy

¶23 The purpose and flagrancy of the officer's unlawful conduct that began the encounter is the factor that most "'directly relates to the deterrent value of suppression.'" *State v. Newland*, 2010 UT App 380, ¶ 17, 253 P.3d 71 (quoting *State v. Thurman*, 846 P.2d 1256, 1263 (Utah 1993)). This factor requires a court to assess whether the officer's conduct was both purposeful, that is, "'the misconduct was investigatory in design and purpose and executed in the hope that something might turn up,'" and flagrant, meaning "'the impropriety of the offic[er]'s miscon-

duct was obvious or the offic[er] knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless.'" *See id.* ¶ 20 (quoting *United States v. Simpson*, 439 F.3d 490, 496 (8th Cir. 2006)).

¶24 According to Strieff, the evidence demonstrates a quality of purposefulness and flagrancy in Officer Fackrell's actions that weighs in favor of excluding the methamphetamine and paraphernalia evidence. In particular, he claims that Officer Fackrell "wanted to search Strieff . . . so he illegally stopped Strieff and searched for [a warrant]." Thus, he asserts, the "opportunity to discover the warrant depended entirely on the illegal detention." The district court, however, found that Officer Fackrell stopped Strieff for the legitimate purpose of investigating a suspected drug house. It further found Officer Fackrell credible when he testified that he believed that the information known to him at the time was sufficient to support a reasonable, articulable suspicion to detain Strieff, a belief that later turned out to be mistaken. Strieff has challenged the denial of the motion to suppress on the basis that the district court applied the wrong legal standard but has not challenged these fact findings, and we therefore must accept them as the district court found them. *See generally C & Y Corp. v. General Biometrics, Inc.*, 896 P.2d 47, 52 (Utah Ct. App. 1995) (stating that where the party has not challenged the factual findings, appellate courts "must accept th[e] find-

ing[s] as true"). Furthermore, when the undisputed findings of fact are sufficient to support the district court's legal conclusions, the failure to challenge the findings is usually a basis for upholding the resulting conclusions—in this case, the court's conclusion that "[t]he stop was not a flagrant violation of the Fourth Amendment[; r]ather it was a good faith mistake on the part of the officer . . " However, the issue of what weight to give a warrant as an intervening circumstance in the attenuation analysis presents a novel question in Utah, and the purpose and flagrancy factor plays an integral role in that determination because it functions as an indispensable safeguard of the constitutional right to be protected from unlawful search and seizure. For these reasons, we think it worthwhile to examine the facts pertinent to the trial court's assessment of purposefulness and flagrancy in the context of applicable case law from other jurisdictions in order to clarify how the discovery of a warrant and the purpose and flagrancy factors interrelate.

¶25 While it is true, as Strieff contends, that Officer Fackrell's actions were "investigatory in nature," most detentions are, so the analysis cannot simply end there. Indeed, the purpose and flagrancy factor does not treat investigatory intent as presumptively weighing in favor of exclusion; rather, the focus is on the sort of investigation that began as or has morphed into a fishing expedition conducted in conspicuous disregard of constitutional boundaries, *see*

Newland, 2010 UT App 380, ¶ 20. In other words, for the initial illegality to be deemed purposeful and flagrant, Officer Fackrell's detention of Strieff must have been "'investigatory in design and purpose and executed in the hope that something might turn up'" and "'the impropriety of the . . misconduct [must have been] obvious or [he must have known], at the time, that his conduct was likely unconstitutional but [he] engaged in it nevertheless.'" *See id.* (quoting *Simpson*, 439 F.3d at 496); *see also* Random House, Inc., *Dictionary.com Unabridged*, *available at* www.dictionary.reference.com/browse/flagrant (last visited August 27, 2012) (defining "flagrant" as "shockingly noticeable or evident; obvious; glaring").

¶26 That was not the case here. In detaining Strieff, Officer Fackrell was relying on information that appeared reliable. The anonymous tip about drug activity had been corroborated to some extent by the officer's personal observations. Officer Fackrell testified that, in his experience, short-term traffic at the frequency he observed during different times of day throughout the course of a week was "enough [to] raise[] . . . suspicion" about drug activity at the house. He further testified that "everybody [he] saw visiting the house" stayed "[j]ust a couple minutes" and he assumed that Strieff was one of those short-term visitors. Although this was a questionable assumption given that he did not see Strief arrive, unreasonableness alone is not the hallmark of purpose and flagrancy. "[A]ll Fourth Amendment

violations are by definition unlawful and therefore unreasonable. . . '[U]nreasonableness itself does not suggest that [an officer's] conduct was obviously improper or flagrant or that he knew it was likely unconstitutional.'" *Newland*, 2010 UT App 380, ¶ 20 (second and third alterations in original) (quoting *United States v. Herrera-Gonzalez*, 474 F.3d 1105, 1113 (8th Cir. 2007)). In addition, Officer Fackrell testified that he stopped Strieff so that he could further investigate what was going on inside the house. There is no indication in the record that the officer stopped Strieff with the purpose of checking for outstanding warrants, and the district court found that he did not target Strieff in knowing or obvious disregard of constitutional limitations. *Cf. People v. Mitchell*, 824 N.E.2d 642, 650, 644 (Ill. App. Ct. 2005) (affirming the suppression of drug evidence because "the sole apparent purpose of the detention [wa]s to check for a warrant" where the officer "did not think [the defendant] was involved in anything criminal"); *State v. Soto*, 2008-NMCA-032, ¶¶ 1–2, 27, 143 N.M. 631, 179 P.3d 1239 (affirming the suppression of evidence because "[t]he purpose of the stop—to obtain information from [the d]efendant—was directly related to [the d]efendant's ultimate arrest"). Rather, the facts support the district court's conclusion that Officer Fackrell "did not cause and could not have anticipated" discovery of the arrest warrant.

¶27 The court's conclusion that Officer Fackrell's conduct was neither purposeful nor flagrant is further supported by the circumstances of the encounter as a whole. The officer's misconduct amounted to a misjudgment, one of constitutional proportion certainly, but a single misstep over the constitutional boundary rather than a deliberate transgression. *See generally Rawlings v. Kentucky*, 448 U.S. 98, 110 (1990) (stating that conduct premised on an error about the officer's authority "does not rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion" of evidence); *People v. Brendlin*, 195 P.3d 1074, 1080 (Cal. 2008) ("[A] mere 'mistake' with respect to the . law[] does not establish that the . . stop was pretextual or in bad faith."). Moreover, from Strieff's perspective, the degree of intrusion upon his rights, though real, was relatively minor. Even without reasonable, articulable suspicion, Officer Fackrell could legally have stopped Strieff and asked to see his identification, noted his name and date of birth, and then run a warrants check while Strieff remained free to leave. *See, e.g.*, *State v. Hansen*, 2002 UT 125, ¶ 34, 63 P.3d 650 (stating that there is no Fourth Amendment seizure when an encounter is consensual, as evidenced by a person voluntarily responding to noncoercive police questioning); *State v. Deitman*, 739 P.2d 616, 618 (Utah 1984) (per curiam) (concluding that no detention occurs when an officer merely asks a defendant for identification and for an explanation of his or

her activities). Had a warrant then turned up, the officer would have had a constitutional basis for detaining Strieff as well as a professional obligation to arrest him. The situation that actually developed in this case is not so different as to suggest that the detention was either a deliberate or glaring violation of Strieff's constitutional rights or the result of official indifference to them. And, although we accept the State's concession that Strieff was not free to leave because Officer Fackrell retained his identification, we note that the furthest Officer Fackrell may have taken Strieff's identification was to the officer's nearby vehicle. Recognizing that such a minimal encroachment does not justify a Fourth Amendment violation, we nevertheless view the relatively slight intrusion as support for the district court's conclusion that Officer Fackrell was not acting purposefully or flagrantly in detaining Strieff. *See generally State v. Martin*, 179 P.3d 457, 463–64 (Kan. 2008) (taking into account all the circumstances surrounding the officers' encounter with the defendant, including the relatively minimal intrusion upon the defendant's privacy by engaging him in a brief conversation about his activities, to conclude that the officer's conduct was not purposeful). The purpose and flagrancy factor therefore weighs against suppression.

4. Balancing the Attenuation Factors

¶28 Finally, we address whether the district court correctly concluded that the methamphetamine and paraphernalia evidence discovered on Strieff was sufficiently attenuated from the initial illegal detention. "This balancing [test] necessitates consideration of all factors without giving any of them dispositive weight . . . [, but recognizes that t]he factors are not of mathematically equal importance." *State v. Newland*, 2010 UT App 380, ¶ 26, 253 P.3d 71 (first alteration in original) (internal quotation marks omitted).

¶29 With respect to temporal proximity, we recognize that Strieff's illegal detention and the discovery of the drugs and paraphernalia in his possession occurred within a very short time period. As we have noted, however, the facts of a case affect the relative weight of the temporal proximity factor. Because temporal proximity is "a circumstance surrounding the[] events," its relative probative value contracts when the facts demonstrate that temporal proximity had little or no bearing on the subsequent conduct of the police or the defendant. *See generally id.* ¶ 14 (internal quotation marks omitted). "In routine police encounters that lead to warrants checks, there is almost always no temporal break between the initial detention and the subsequent discovery of the evidence." *State v. Moralez*, 242 P.3d 223, 231 (Kan. Ct. App. 2010), *review granted* (Kan. 2011); *accord*

Brendlin, 195 P.3d at 1079 ("[Short temporal proximity] is the typical scenario in essentially every case in this area." (internal quotation marks omitted)). And temporal proximity is less significant in the case where the intervening circumstance is discovery of a warrant because it "is not a voluntary act by the defendant" susceptible to exploitation or contamination by the recent illegality. *See United States v. Simpson*, 439 F.3d 490, 495 (8th Cir. 2006). We therefore conclude that the short time between the illegal detention and the discovery of the evidence is of relatively little weight under the circumstances of this case.

¶30 While temporal proximity has little effect on the analysis in cases involving discovery of a warrant, the intervening circumstance and purpose and flagrancy factors "dovetail" in a way that makes them mutually interdependent in the attenuation analysis. *See Martin*, 179 P.3d at 463 ("The third factor, the purpose and flagrancy of the official misconduct, dovetails with the second factor . "). The Alaska Court of Appeals has distilled the relationship between the two factors in the following way:

> If, during a non-flagrant but illegal stop, the police learn the defendant's name, and the disclosure of that name leads to the discovery of an outstanding warrant for the defendant's arrest, and the execution of that warrant leads to the discovery of

> evidence, the existence of the arrest warrant will be deemed an independent intervening circumstance that dissipates the taint of the initial illegal stop vis-à-vis the evidence discovered as a consequence of a search incident to the execution of the arrest warrant.

McBath v. State, 108 P.3d 241, 248 (Alaska Ct. App. 2005). The Louisiana Supreme Court explained the relationship more directly: "Undoubtedly, had the officer[] not learned the defendant's name due to the initial stop, [he] would not have discovered the outstanding arrest warrant[]." *See State v. Hill*, 97-2551, p. 8–9 (La. 11/6/98); 725 So. 2d 1282, 1287. But, the court points out, reliance on this kind of simple "causal link . . to suppress evidence [is] directly contrary to the dictates of the United States Supreme Court because a per se 'but for' causation test has been specifically rejected as a basis for a decision to suppress evidence." *Id.* (citing *Brown v. Illinois*, 422 U.S. 590, 603 (1975)). In other words, not only are the "officer['s] reasons for detaining [a defendant] and the flagrancy of the invasion on . privacy" critical to the determination of the weight to be given to the warrant, *see Martin*, 179 P.3d at 463, so too are the means by which it was discovered, *see McBath*, 108 P.3d at 248.

¶31 A number of jurisdictions have recognized this principle. In *Jacobs v. State*, 2006 OK CR 4, 128

P.3d 1085, the Oklahoma Court of Criminal Appeals held that such an approach "balances a defendant's right against illegal search and seizure with the community's expectation that a valid arrest warrant may be served upon a subject, even if police learned about the arrest warrant after an illegal stop." *Id.* ¶ 11. By taking into account the officer's intent and conduct in detaining the defendant as a meaningful factor in the analysis, the "rule [effectively] discourages police from flagrantly illegal, investigatory seizures" because at some point, the gravity of the misconduct will tip the balance in favor of suppression. *Id.* But, "[a]t the same time, [the approach] does not attempt to punish police for mistakes or errors made in good faith[because s]uch punishment would be unlikely to deter police misconduct." *Id.* The Florida Supreme Court has described the interrelationship of concerns in another way, reasoning that because a "search was incident to the outstanding warrant and not incident to the illegal stop," "[t]he illegality of the stop d[id] not affect the continuing required enforcement of the court's order that respondent be arrested" where the officer was mistaken in his justification for stopping the defendant and did not act in bad faith or under pretext. *State v. Frierson*, 926 So. 2d 1139, 1144 (Fla. 2006).

¶32 But, "[w]here the seizure is flagrantly or knowingly unconstitutional or is otherwise undertaken as a fishing expedition, the purpose and flagrancy factor will make it unlikely that the [state] would be

able to demonstrate an attenuation of the taint of the initial unlawful seizure" even when the officers discover a warrant. *People v. Brendlin*, 195 P.3d 1074, 1081 (Cal. 2008). For example, "[i]f the purpose of an illegal stop or seizure is to discover a warrant—in essence, to discover an intervening circumstance—the fact that a warrant is actually discovered cannot validate admission of the evidence that is the fruit of the illegality." *State v. Hummons*, 253 P.3d 275, 278 (Ariz. 2011); *see also Jacobs*, 2006 OK CR 4, ¶ 11 (stating that when officers engage in "flagrantly illegal, investigatory seizures," the discovery of a warrant does not attenuate the initial illegal detention). Such was the case in *People v. Mitchell*, 824 N.E.2d 642 (Ill. App. Ct. 2005), where the Illinois Appellate Court upheld a lower court ruling that suppressed evidence discovered pursuant to an arrest on an outstanding warrant found during an illegal detention because when the officers encountered the defendant walking around his neighborhood at 5:00 a.m., they were not "'really looking for anyone who committed a crime,'" nor did they believe that the defendant needed help or was involved in criminal activity. *See id.* at 644. The court reasoned that the evidence was not purged of the taint of the illegal detention because "the officers stopped defendant for no apparent reason other than to run a warrant check on him," evidencing a "complete disregard of citizens' rights to be 'secure in their person.'" *Id.* at 649; *see also State v. Soto*, 2008-NMCA-

032, ¶¶ 27–28, 143 N.M. 631, 179 P.3d 1239 (affirming the suppression of drug evidence where the officers "stopped [the d]efendant on the basis of nothing other than the vague notion that they would obtain [the d]efendant's personal information from him [in case any crimes were committed that night in that area], and without any further suspicion, . . ran a warrant check on him" because the reason for the stop "was directly related to [the d]efendant's ultimate arrest").

¶33 In summary, the significance of a warrant discovered during an illegal detention depends upon the nature of the officer's intent and conduct in effecting the stop. The purpose and flagrancy factor thus acts as a mechanism to ensure that abusive police tactics are not legitimized by after-the-fact justification through the discovery of a valid warrant.

¶34 This conclusion and the analysis that leads to it to means that we must reject Strieff's argument that the remedy that most effectively deters unconstitutional police conduct while still permitting reasonable enforcement of the law is to allow a police officer to arrest a person on an outstanding warrant that is discovered during an illegal detention but to suppress any evidence seized during a search incident to that arrest. Strieff's proposal apparently arises from a statement in *United States v. Green*, 111 F.3d 515 (7th Cir. 1997), in support of treating a warrant as an intervening circumstance, that "[i]t would be

startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of 'Olly, Olly, Oxen Free.'" *Id.* at 521. We agree with Strieff that this statement in *Green* proposes a rationale for considering the warrant as an intervening circumstance that makes little sense. It is simply unnecessary to invalidate the arrest itself in order to create a deterrence for police misconduct in effecting the initial detention. While deterrence would undoubtedly result, the societal cost clearly would be too high to justify such a rule. Rather, the approach we have adopted here of treating a warrant as an intervening circumstance that, in the absence of purposefulness or flagrancy, attenuates the evidence seized from the initial illegality, is a more nuanced and satisfactory approach that provides adequate deterrence while avoiding unnecessarily heavy societal burdens.[10]

---

[10] In his dissent, our colleague articulately highlights how treating a preexisting warrant as an intervening circumstance that is free from the taint of the illegality creates the potential for abuse. *See infra* ¶ 52 note 7. As noted above, we share these concerns but respectfully disagree that exclusion is the only adequate remedy. As we explained, a per se exclusionary rule in the case of a warrant seems to turn the attenuation analysis on its head because it would always exclude evidence produced by a mechanism that is not subject to contamination by the illegality of the initial encounter—a valid arrest war-

(continued)

rant—while treating in a more nuanced way mechanisms that are clearly susceptible to such taint, such as voluntary statements or consents to search. The dissent seems to see the more pristine status of a warrant as too much of a temptation to police, who would not have to clear the "taint" hurdle in the case of a warrant that complicates the path to admissibility of evidence produced by volitional mechanisms such as consent.

We do not dispute that the potential for abuse exists, but that potential exists in all circumstances that fall within the scope of the attenuation doctrine, which was created to more finely balance the costs and benefits of exclusion of evidence in just such complicated circumstances. Further, we believe that district court judges are capable of applying that doctrine in a way that will appropriately constrain the incentive and potential for abuse in the case of intervening warrants, just as we have trusted them to do where the evidence is discovered as a result of a voluntary act by the defendant. As we have explained, the purpose and flagrancy prong of the attenuation analysis is aimed directly at deterrence of illegal official conduct, and judges are aware of the potential for abuse and well positioned to scrutinize an officer's explanation of the basis of the stop and the attendant circumstances in order to make appropriate use of the exclusionary rule. Certainly other courts have managed to effectively police the boundaries established here. *See, e.g.*, *People v. Mitchell*, 824 N.E.2d 642, 650, 644 (Ill. App. Ct. 2005) (affirming the suppression of drug evidence because "the sole apparent purpose of the detention [wa]s to check for a warrant" where the officer "did not think [the defendant] was involved in anything criminal"); *State v. Soto*, 2008-NMCA-032, ¶¶ 27–28, 143 N.M. 631, 179 P.3d 1239 (affirming the suppression of evidence because "[t]he purpose of the stop—to obtain information from [the d]efendant—was directly related to [the d]efendant's ultimate arrest"). We believe the courts of this jurisdiction to be equally up to the task.

¶35 Moreover, we are not persuaded that there is sufficient justification for automatically separating the arrest from the evidence seized incident to that arrest under such circumstances. Rather, the general presumption is that if an arrest is lawful under the constitution, then any evidence that is discovered as a result of that arrest is admissible. *See generally United States v. Bailey*, 691 F.2d 1009, 1018 (11th Cir. 1982) (stating that even in the context of an illegal detention, the identification of a lawful reason to arrest a suspect is grounds for effecting the arrest and conducting a search incident to the arrest, the evidence of which may be used against the suspect). A rule of automatic suppression is no more desirable or necessary than a rule that automatically cleanses evidence found incident to arrest on a warrant from the taint of the initial illegality. Rather, the attenuation doctrine provides a sufficient mechanism for sorting through the circumstances so as to reach a principled conclusion as to whether suppression of evidence is appropriate under the facts of each case.

¶36 We now consider the interrelationship of the intervening circumstance and purpose and flagrancy factors in Strieff's case. The district court found that Officer Fackrell mistakenly believed he had reasonable, articulable suspicion to detain Strieff and that his discovery of the warrant was not a deliberate exploitation of the unlawful detention. The only information obtained from Strieff necessary to locate

the warrant was his name and date of birth. Although this information was learned during an encounter later deemed to be illegal, it was sought as a matter of course, rather than being the purpose of the stop itself. Most importantly, the search which yielded the methamphetamine and paraphernalia evidence occurred incident to a lawful arrest required by an outstanding arrest warrant. *See generally Brendlin*, 195 P.3d at 1080 (stating that where a search is not undertaken until a warrant is discovered, the discovered "evidence was . . . the fruit of the outstanding warrant, and was not obtained through exploitation of the" illegality). The discovery of the warrant and resulting discovery of the evidence thus were not the product of the officer's exploitation of the initial illegality. *See McBath v. State*, 108 P.3d 241, 248 (Alaska Ct. App. 2005) ("If, during a non-flagrant but illegal stop, the police learn the defendant's name, and the disclosure of that name leads to the discovery of an outstanding warrant for the defendant's arrest, and the execution of that warrant leads to the discovery of evidence, the existence of the arrest warrant will be deemed an independent intervening circumstance that dissipates the taint of the initial illegal stop vis-à-vis the evidence discovered as a consequence of a search incident to the execution of the arrest warrant."); *State v. Hill*, 97-2551, p. 8–9 (La. 11/6/98); 725 So. 2d 1282, 1287 (same, citing *Brown v. Illinois*, 422 U.S. 590, 603 (1975), for the proposition that the Supreme

Court has rejected a "but for" test as a basis for suppressing evidence).

¶37 Because the temporal proximity factor has relatively little weight and the other two factors weigh in favor of admitting the drug evidence discovered while conducting a search incident to Strieff's arrest, we conclude that the district court properly weighed and balanced the attenuation factors and appropriately denied Strieff's motion to suppress.

CONCLUSION

¶38 When a person is illegally detained, the discovery of a warrant is an intervening circumstance that may eliminate the taint of the initial illegality from the evidence discovered incident to the arrest on that warrant. The significance of the warrant, however, depends upon the nature of the officer's intent and conduct in effecting the stop. The purpose and flagrancy factor therefore acts as a mechanism to ensure that abusive police tactics are not legitimized by after-the-fact justification through the discovery of a valid warrant.

¶39 Here, the discovery of the preexisting warrant was an intervening circumstance that, coupled with the absence of purposefulness and flagrancy on the part of Officer Fackrell in detaining Strieff, sufficiently attenuated the initial illegal detention from the methamphetamine and drug paraphernalia found during the search incident to arrest on the

outstanding warrant. We therefore affirm the district court's denial of the motion to suppress.

Stephen L. Roth, Judge

¶40 I CONCUR:

J. Frederic Voros Jr.,
Associate Presiding Judge

THORNE, Judge (dissenting):

¶41 I respectfully dissent from the majority opinion. Although the majority opinion marshals an impressive body of case law from other jurisdictions in support of its analysis, I disagree with its ultimate conclusion that suppression of the evidence in this case is not necessary to deter police misconduct. I believe that this case is most appropriately analyzed under *State v. Topanotes*, 2003 UT 30, 76 P.3d 1159, a Utah Supreme Court case with remarkably similar factual underpinnings that strongly suggests that suppression is required here.

¶42 In *Topanotes*, two police officers had gone to the home of a recently-arrested prostitute to confirm her

actual residence. *See id.* ¶ 2. While there, the officers encountered a woman—Topanotes—who matched a description of someone else who allegedly lived at the house. *See id.* Although the officers had no reasonable suspicion or probable cause regarding Topanotes, they nevertheless "stopped her and asked for identification" and then "perform[ed] a warrants check as part of 'routine procedure' or 'common practice'" while retaining Topanotes's identification card. *See id.* When the warrants check revealed outstanding warrants for Topanotes, the officers arrested her, searched her incident to arrest, and discovered heroin on her person. *See id.* ¶ 3. The Utah Supreme Court ultimately held that the heroin should be suppressed despite the existence of the warrants. *See id.* ¶ 22.

¶43 I find the factual situations in the instant case and *Topanotes* to be indistinguishable for purposes of a Fourth Amendment attenuation analysis. In both cases, the defendants were on foot when they were stopped and asked for identification without reasonable suspicion or probable cause. In both cases, the police then illegally detained the individuals by retaining their identification cards while performing routine warrants checks.[1] And in both cases, the

---

[1] The majority opinion states, "Even without reasonable, articulable suspicion, Officer Fackrell could legally have stopped Strieff and asked to see his identification, noted his

(continued)

police found outstanding warrants, arrested the defendants on the warrants, searched them incident to their arrests, and found contraband in their possession.

¶44 What does distinguish *Topanotes* from this case is the specific legal doctrine at issue. In *Topanotes*, the State argued for application of the inevitable discovery doctrine, which "enables courts to look to the facts and circumstances surrounding the discovery of the tainted evidence and asks whether the police would have discovered the evidence despite the illegality." *See id.* ¶ 14. In this case, we are called upon to apply the related doctrine of attenuation, whereby

---

name and date of birth, and then run a warrants check while Strieff remained free to leave." *See supra* ¶ 27. So long as such a "stop" and request for identification was entirely voluntary on Strieff's part, I agree with the majority's statement. *See generally State v. Hansen*, 2002 UT 125, ¶ 34, 63 P.3d 650 (stating that there is no Fourth Amendment seizure when an encounter is consensual). Here, however, even if Strieff had been free to ignore Officer Fackrell's questions and request for identification, Fackrell clearly detained Strieff for Fourth Amendment purposes when he conducted a warrants check while retaining Strieff's identification card. *See generally Salt Lake City v. Ray*, 2000 UT App 55, ¶ 17, 998 P.2d 274 ("Consequently, although Ray was not seized by Officer Eldard's original request for identification, this level one encounter escalated into a level two stop when Eldard retained Ray's identification while running the warrant check. During this time a reasonable person would not have felt free to leave.").

evidence that is derivative of an illegal search or seizure will not be suppressed if obtained "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). These two exceptions to the exclusionary rule—along with a third exception, the independent source doctrine—are "closely related but analytically distinct." *See United States v. Terzado-Madruga*, 897 F.2d 1099, 1113 (11th Cir. 1990).

¶45 Even in light of the distinct legal doctrines involved, however, *Topanotes*'s inevitable discovery analysis remains potent authority for the "closely related" attenuation analysis at issue in the present case, *see id.*, particularly considering the nearly identical factual circumstances in the two cases. Reviewing the *Topanotes* analysis, it is clear that the supreme court made rulings that are applicable to each of the three attenuation factors employed by the majority in this case. Examining those three factors in light of *Topanotes* leads me to the inevitable conclusion that the evidence in this case should be suppressed.

¶46 As noted above, the district court in this case relied on the doctrine of attenuation to determine that the evidence against Strieff need not be suppressed notwithstanding its discovery after Strieff's illegal detention. Utah courts have adopted a three-part test to determine when attenuating circumstances will purge evidence or statements from a

prior illegality by police. *See State v. Arroyo*, 796 P.2d 684, 691 n.4 (Utah 1990) (adopting "'temporal proximity of the arrest and the confession, the presence of intervening circumstances,'" and "'the purpose and flagrancy of the official misconduct'" as relevant factors in determining whether exploitation of police illegality has occurred (quoting *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975)). In the context of a warrant discovered after an illegal detention, the attenuation test considers the temporal proximity of the initial illegality to the discovery of the warrant, the presence of intervening circumstances, and the purpose and flagrancy of the illegal misconduct. *Cf. State v. Newland*, 2010 UT App 380, ¶¶ 11–26, 253 P.3d 71 (applying the three-part attenuation test in the context of consent following an illegal search).

¶47 As to the first prong of this test, the majority opinion adopts the district court's finding that the time that had elapsed from Strieff's illegal detention to the discovery of the warrant and the resulting search incident to his arrest was "relatively short." Since the discovery of the warrant had actually occurred *during* Strieff's illegal detention, I would go further and characterize the warrant discovery and the illegal detention as contemporaneous. *Cf. State v. Topanotes*, 2003 UT 30, ¶ 19, 76 P.3d 1159 (stating that "the warrants check [was] performed contemporaneously with the illegal detention"). Nevertheless, the majority and I are in agreement that the

first prong of the attenuation test weighs in favor of suppression.

¶48 I do, however, disagree with the majority's conclusion that the contemporaneous nature of the detention and the discovery of Strieff's warrant is "of relatively little weight under the circumstances of this case." *See supra* ¶ 29. As a purely practical matter, the contemporaneous nature of the detention and the warrant check deprived Strieff of the opportunity to leave the scene or terminate the otherwise "voluntary" encounter.[2] *Cf. id.* ¶ 20 ("We find 'most unrealistic' the assumption that Topanotes would have waited for the police to check for warrants and arrest her with heroin in her possession even if she had not been unlawfully detained."). The temporal confluence of the illegal detention and the warrants check thus played a very direct role in the discovery of the warrant and the ultimate discovery of the contraband.

---

[2] The law surrounding level one consensual encounters assumes that a person retains the right to terminate the encounter and thereby end his or her contact with police. *See Hansen*, 2002 UT 125, ¶ 34 ("A level one citizen encounter with a law enforcement official is a consensual encounter wherein a citizen voluntarily responds to non-coercive questioning by an officer. Since the encounter is consensual, and the person is free to leave at any point, there is no seizure within the meaning of the Fourth Amendment." (citation omitted)).

¶49 As to the second attenuation factor, I acknowledge that other courts have determined that the discovery of an arrest warrant constitutes an "intervening circumstance" for purposes of an attenuation analysis. *See, e.g.*, *People v. Brendlin*, 195 P.3d 1074, 1076 (Cal. 2008). However, under Utah law, there is nothing intervening about the discovery of Strieff's warrant. "Intervening circumstances are events that create a clean break in the chain of events between the misconduct and the [discovery of a warrant]." *Newland*, 2010 UT App 380, ¶ 15 (internal quotation marks omitted).[3] Officer Fackrell's

---

[3] *State v. Newland*, 2010 UT App 380, 253 P.3d 71, like many other Utah attenuation cases, arose in the context of consent to search given after an initial illegality. In my utilization of the quotation of *Newland*, I have altered the original word "consent" to reflect the circumstances of this case, the "discovery of a warrant." My choice of these words is deliberate and, I believe, appropriate, but it does have substantive implications for the intervening circumstances determination—obviously, if the "discovery of a warrant" is the event that must be preceded by intervening circumstances, then that same discovery cannot itself be the intervening circumstance that satisfies the attenuation test. However, my formulation is consistent with *Newland* and Utah's other consent cases, which do not treat the consent as an intervening circumstance between the initial illegality and the ultimate search. Rather, those cases look for circumstances intervening between the illegality and the consent itself. *See, e.g.*, *Hansen*, 2002 UT 125, ¶ 68 ("Next, we consider whether there were any intervening factors between [the] misconduct and Hansen's consent that may have mitigated the

(continued .)

discovery of Strieff's warrant was no "clean break in the chain of events," *see id.*, but rather was the natural and immediate result of Officer Fackrell illegally detaining Strieff and calling in a warrants check during that detention. Under similar circumstances, the Utah Supreme Court has intimated as much. *See Topanotes*, 2003 UT 30, ¶ 19 ("There must be *some other circumstance*, something outside the warrants check performed contemporaneously with the illegal detention, supporting inevitable discovery 'to prevent the inevitable discovery exception from swallowing the exclusionary rule.'" (emphasis added)). In similar fashion, I see no intervening circumstances between the initial illegality here and the discovery of Strieff's warrant.[4]

---

illegality. Intervening circumstances may include such events as an officer telling a person he or she has the right to refuse consent or to consult with an attorney."); *State v. Thurman*, 846 P.2d 1256, 1274 (Utah 1993) (addressing consent obtained via a form that informed the defendant of his "constitutional right not to have a search made of the premises described below without a search warrant" and his "right to refuse to such a search"); *Newland*, 2010 UT App 380, ¶ 15 (discussing the types of circumstances that can intervene "between the misconduct and the consent" (omission in original) (internal quotation marks omitted)).

[4] There conceivably could be instances where a warrant would not have been discovered but for some police illegality and yet the resulting arrest is attenuated by intervening circumstances. Suppose, for example, that Officer Fackrell ille-

(continued)

¶50 I also conclude that the third attenuation factor—whether Officer Fackrell's illegal conduct was "purposeful or flagrant," *see State v. Newland*, 2010 UT App 380, ¶ 20, 253 P.3d 71—favors suppression in this case. I simply cannot agree with the majority opinion that "[t]here is no indication in the record that the officer stopped Strieff with the purpose of checking for outstanding warrants." *See supra* ¶ 26. To the contrary, Fackrell detained Strieff by retaining his identification while Fackrell called in a warrants check. Fackrell's intent in conducting this warrants check was, presumably, to determine if Strieff had any outstanding warrants. *See generally State v. Sisneros*, 631 P.2d 856, 859 (Utah 1981) ("[A] person is presumed to intend the natural and probable consequences of his acts." (internal quotation marks omitted)). Thus, regardless of Fackrell's mo-

---

gally detained Strieff for ten minutes of questioning but did not determine his identity or discover the warrant. Then suppose that, shortly thereafter, Strieff was waiting to cross a street and was recognized by a second officer who was driving by and was aware of Strieff's warrant. Strieff's release by Officer Fackrell and the happenstance of his subsequent encounter with the second officer would strike me as intervening circumstances between the illegal detention and the discovery of the warrant—even though, but for the illegal detention, Strieff would not have been waiting at that particular intersection when the second officer drove by and recognized him as wanted on a warrant.

tivation for initially approaching Strieff,[5] his detention of Strieff while conducting a warrants check was clearly purposeful behavior intended to discover the very warrant that led to Strieff's arrest and search.

¶51 Further, "'purpose and flagrancy' [is] the most significant factor in a suppression analysis because it 'directly relates to the deterrent value of suppression.'" *Newland*, 2010 UT App 380, ¶ 17 In *Topanotes*, the supreme court determined under similar circumstances that "[a]llowing the evidence in this situation would provide no deterrent at all to future unlawful detentions." *See* 2003 UT 30, ¶ 19. The clear import of this statement, taken in context, is that suppressing the evidence *would* deter similar future police misconduct.[6] Given the direct relationship between deterrence and the purposefulness and flagrancy of police misconduct, the supreme court's holding that suppression would serve a deterrent purpose under these circumstances seems to me to be an implicit recognition that this type of police

---

[5] Officer Fackrell initially stopped Strieff because Strieff had just left a suspected drug house. This suggests to me that Fackrell's stop of Strieff was motivated not only by a desire to learn more about the activities occurring at the house but also by a desire to investigate Strieff personally as a potential drug purchaser.

[6] I note that the warrants check in *Topanotes* was conducted "as part of 'routine procedure' or 'common practice.'" *See State v. Topanotes*, 2003 UT 30, ¶ 2, 76 P.3d 1159.

misconduct is purposeful or flagrant for purposes of an attenuation analysis and is therefore a proper subject for deterrence. *See generally State v. Thurman*, 846 P.2d 1256, 1263–64 ("[I]f the police had no 'purpose' in engaging in the misconduct . . . suppression would have no deterrent value.").

¶52 The majority opinion does reflect a great effort to draw some line protecting the public from purposeful or flagrant police abuse of warrants checks, and I applaud that effort. However, I cannot agree with the majority's conclusion that whether suppression is appropriate in any given circumstance "depends upon the nature of the officer's intent and conduct in effecting the stop." *See supra* ¶ 33.[7] Warrants do not reveal themselves, and they are generally only discovered when the police affirmatively look for them. When such an intentional warrants check takes place during an illegal detention,

---

[7] Indeed, such a standard seems to me to practically invite police officers to routinely make illegal stops and warrants checks so long as some other reason for the stop can be articulated. Under the majority's rule, the articulated reason need not satisfy the Fourth Amendment's requirements for a legal stop but must only establish some reason for the stop other than a bare desire to check for warrants. The ease with which this standard could be satisfied by all but the most unimaginative police officers would, as a practical matter, provide an incentive for police officers to make illegal stops and warrants checks as a matter of routine.

it is inevitably the case, at least in my opinion, that the detention has been purposefully exploited to discover the warrant and that evidence discovered in a contemporaneous search incident to arrest on the warrant should be suppressed to deter such a practice.

¶53 In sum, I would conclude that all three of the attenuation factors weigh in favor of suppression in this case and I would reverse the district court and suppress the evidence found during the search incident to Strieff's arrest. I reach this conclusion in the face of the many warrant-discovery cases from other jurisdictions, as cited in the majority opinion, that have decided to the contrary—not to mention the carefully constructed analysis of the majority opinion itself. Nevertheless, I just cannot get around the fact that the evidence in this case was discovered as a direct result of police misconduct and that, without suppression, there will be no deterrence of similar misconduct in future encounters between pedestrians and police.

¶54 Ultimately, I agree with the majority that the attenuation analysis in these circumstances involves a "balancing of the mutual concerns of discouraging police conduct that results in the illegal detention of a citizen, while recognizing the legitimate interest of the [S]tate in enforcing outstanding arrest warrants." *See State v. Frierson*, 926 So. 2d 1139, 1145–46 (Fla. 2006) (Anstead, J., concurring). However,

the State's primary and laudable interest in enforcing arrest warrants is to get those persons named therein into custody to answer for the charges underlying the warrants.[8] As to this primary interest, I see little room for balancing. Whenever an arrest warrant is discovered—however it is discovered—it is proper for police to arrest the person named in the warrant. *See, e.g.*, *United States v. Green*, 111 F.3d 515, 521 (7th Cir. 1997) ("It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of 'Olly, Olly, Oxen Free.'").

¶55 Many courts seem to end the attenuation analysis there, reasoning that because searches are allowed incident to arrest, then a valid arrest necessarily means a valid search. *See, e.g.*, *id.* ("Because the arrest is lawful, a search incident to the arrest is also lawful."). However, I am completely comfortable with decoupling the validity of the arrest from the admissibility of the resulting evidence for purposes of the Fourth Amendment analysis.[9] To me, the only

---

[8] By contrast, searches incident to arrest are just that—incidental.

[9] In a sense, this situation is analogous to a double hearsay problem where an exception cures one instance of hearsay but not the other. *Cf. State v. Schreuder*, 726 P.2d 1215, 1231 n.1 (Utah 1986) ("[D]ouble hearsay is admissible if both aspects

(continued)

question is whether suppression will reach back past the warrant to deter the police illegality that led to the warrant's discovery. In the instant case, suppression would give police an incentive to ensure that they have adequate grounds to stop citizens on the street and would ultimately deter similar illegal detentions. Under these circumstances, I have little trouble in concluding that the balancing of interests shifts squarely in favor of suppression of the evidence,[10] while leaving the validity of the arrest based upon the warrant untouched.

---

qualify under an exception to the hearsay rule " (Stewart, J., concurring in result)). Officer Fackrell could neither detain Strieff without reasonable suspicion nor arrest him without probable cause. The warrant cures any probable cause problem, but we are left with the illegal detention. As with double hearsay, I would not allow the evidence unless both impediments to admissibility are removed.

[10] I note that certain types of evidence—e.g., a defendant's DNA, scars, or tattoos—are permanent enough in nature that they could reasonably be expected to be discovered whenever the defendant would eventually be arrested on a warrant. Such evidence is therefore not the sole product of the illegal discovery of the warrant at a particular time and place because it would inevitably be discovered whenever the warrant was executed. Accordingly, I would likely not suppress such evidence, even when a defendant is arrested on a warrant discovered through an illegal detention. The drug evidence at issue in this case is not this type of evidence.

¶56 In any event, I remain convinced that, for purposes of Utah law, my evaluation of the attenuation factors is supported by *State v. Topanotes*, 2003 UT 30, 76 P.3d 1159. I simply cannot read that case and surmise that the Utah Supreme Court would have allowed the evidence discovered in these circumstances if only the State had urged the attenuation doctrine instead of the "closely related" inevitable discovery doctrine. *See United States v. Terzado-Madruga*, 897 F.2d 1099, 1113 (11th Cir. 1990). Unless and until the Utah Supreme Court revisits *Topanotes*, the nearly identical factual situations between that case and this one suggest that *Topanotes* is extremely persuasive, if not binding, authority on the suppression issue in this case. Accordingly, I must dissent from the majority opinion, and I would reverse the district court's suppression ruling and Strieff's convictions below.

William A. Thorne Jr., Judge

LOHRA L. MILLER
District Attorney for Salt Lake County
MATTHEW D. BATES (9861)
Deputy District Attorney
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE THIRD DISTRICT COURT
STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- EDWARD JOSEPH STRIEFF JR., Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND DEFENDANT'S MOTION TO RECONSIDER Case No. 071900011 Hon. Michele Christiansen

Before the Court is the Defendant's motion to suppress and motion to reconsider. The motions seek suppression of evidence discovered during a search incident to the arrest of the Defendant on an outstanding warrant. The parties conceded at argument that Officer Fackrell lacked reasonable suspicion to detain the Defendant and that the initial detention

thus violated the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Utah Constitution. The only question remaining for this Court is whether the discovery of the warrant during the detention attenuates the arrest and search from the unlawful detention and makes suppression an unwarranted remedy. For the reasons stated below, the Court rules that suppression is unwarranted in this case.

FINDINGS OF FACT

Based on the testimony taken at an evidentiary hearing on May 11, 2009, and on the briefing and argument of the parties, the Court makes the following Findings of Fact:

1. Sometime during the month of December ~~2007~~ 2006, the South Salt Lake City Police Department received an anonymous tip on its drug hotline that a house at 2681 South 360 East in Salt Lake County was receiving frequent short-term traffic consistent with drug activity.
2. Officer Doug Fackrell watched the house on and off for approximately three hours over a period of one week. During that time he witnessed some short-term traffic.
3. On December 21, 2006, Officer Fackrell was watching the house and saw the Defendant leave. He did not see when the Defendant entered the house.

4. Officer Fackrell believed that he had seen enough short-term traffic at the house to create a reasonable suspicion that the house was involved in drug activity. He therefore decided to stop the Defendant on suspicion of drug possession or distribution.

5. Upon stopping the Defendant, Officer Fackrell identified him by a Utah Identification Card and discovered that the Defendant had an outstanding warrant from the Salt Lake City Justice Court.

6. Officer Fackrell arrested the Defendant, and, during a search incident to arrest, discovered methamphetamine, a glass drug pipe, and a small green plastic scale with white residue on it.

CONCLUSIONS OF LAW

Based on the Findings of Fact, the Court enters these Conclusions of Law:

1. To determine whether a warrant attenuates a subsequent arrest and search from an illegal act, the Court looks at three factors: (1) the temporal proximity of the illegal act and the search; (2) the presence of an intervening circumstance; and (3) the purpose and flagrancy of the illegal act. *See Brown v. Illinois*, 422 U.S. 590 (1975); *United States v. Green*, 111 F.3d 515 (7th Cir. 1997).

2. In this case, the time between the illegal act and the search was relatively short and weighs in favor of suppressing the evidence.

3. The second factor, the intervening circumstance, weighs in favor of not suppressing the evidence. The Court agrees with other jurisdictions to consider this issue that the discovery of an arrest warrant is an "extraordinary intervening circumstance that purges much of the taint associated with [Officer Fackrell's] unconstitutional conduct." *United States v. Simpson*, 439 F.3d 490, 496 (8th Cir. 2006).

4. The last factor, the purpose and flagrancy of the illegal act, also weighs in favor of not suppressing the evidence. The purpose of the stop was to investigate a suspected drug house. And Officer Fackrell believed, albeit incorrectly, that he had sufficient suspicion of criminal activity to justify stopping the Defendant. The stop was thus not a flagrant violation of the Fourth Amendment. Rather, it was a good faith mistake on the part of the officer as to the quantum of evidence needed to justify an investigatory detention.

5. Weighing the factors in their totality, the Court finds suppression to be an inappropriate remedy. Officer Fackrell did not exploit the initial unlawful detention to search the Defendant's person. Rather, the search was

conducted after discovering an outstanding warrant and arresting the Defendant on that warrant, an intervening circumstance that Officer Fackrell did not cause and could not have anticipated.

6. The Court further concludes, based on the reasons articulated in point II of the State's Supplemental Memorandum Opposing Defendant's Motion to Reconsider, that there is no reason in this case to construe the protections afforded by Article I, Section 14 any broader than those afforded by the Fourth Amendment. The analysis is the same under either provision, and suppression is thus an inappropriate remedy.

ORDER

Based on this Court's findings and conclusions, Defendant's motion to suppress evidence and motion to reconsider are DENIED.

Dated this 4 day of ~~December 2009~~ January, 2010.

/s/
Judge Michele Christiansen

Approved as to form:

/s/
Robert K. Engar

No. 14-1373

In the Supreme Court of the United States

UTAH,

Petitioner,

v.

EDWARD JOSEPH STRIEFF, JR.,

Respondent.

On Petition for a Writ of Certiorari to the Utah Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

STUART BANNER
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095

PATRICK L. ANDERSON
JOAN C. WATT
Counsel of Record
Salt Lake Legal Defender Association
424 E. 500 South, Ste. 300
Salt Lake City, UT 84111
(801) 532-5444
jwatt@sllda.com

QUESTION PRESENTED

Whether the Utah Supreme Court correctly held that the evidence seized from respondent incident to his arrest on a minor traffic warrant discovered during a concededly unconstitutional detention was inadmissible under the "attenuation" exception to the exclusionary rule.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 1

REASONS FOR DENYING THE WRIT 9

I. The lower court conflict alleged in the certiorari petition does not exist. 9

II. The decision below is correct. 16

III. The facts of this case make it a poor vehicle for addressing the question presented, because the evidence would be suppressed even under Utah's view of the law. 21

CONCLUSION 23

TABLE OF AUTHORITIES

Atkins v. City of Chicago, 631 F.3d 823 (7th Cir. 2011) 13, 14
Brown v. Illinois, 422 U.S. 590 (1975) ..... passim
Cox v. State, 916 A.2d 311 (Md. 2007) 10
Dunaway v. New York, 442 U.S. 200 (1979) 18
Faulkner v. United States, 132 S. Ct. 761 (2011) 1
Jacobs v. State, 128 P.3d 1085 (Okla. Ct. Crim. App. 2006) 11
Johnson v. Louisiana, 406 U.S. 356 (1972) 18
Kaupp v. Texas, 538 U.S. 626 (2003) 6, 18
Nix v. Williams, 467 U.S. 431 (1984) 8
People v. Brendlin, 195 P.3d 1074 (Cal. 2008), *cert. denied*, 556 U.S. 1192 (2009) 1, 10, 15, 16
People v. Padgett, 932 P.2d 810 (Colo. 1997) 10, 13
State v. Bailey, 338 P.3d 702 (Or. 2014) 11, 15
State v. Cooper, 579 S.E.2d 754 (Ga. Ct. App. 2003) 14
State v. Frierson, 926 So. 2d 1139 (Fla. 2006), *cert. denied*, 549 U.S. 1082 (2006) 1, 10
State v. Grayson, 336 S.W.3d 138 (Mo. 2011) ... 10, 15
State v. Hill, 725 So. 2d 1282 (La. 1998) 10
State v. Hummons, 253 P.3d 275 (Ariz. 2011) 10
State v. Mazuca, 375 S.W.3d 294 (Tex. Ct. Crim. App. 2012), *cert. denied*, 133 S. Ct. 1724 (2013) 1, 11
State v. Moralez, 300 P.3d 1090 (Kan. 2013) 10, 13, 15
State v. Page, 103 P.3d 454 (Idaho 2004) 10

State v. Shaw, 64 A.3d 499 (N.J. 2012) 11
State v. Thompson, 438 N.W.2d 131 (Neb. 1989) 10, 14
Taylor v. Alabama, 457 U.S. 687 (1982) 18
Torres v. State, 341 P.3d 652 (Nev. 2015) 14, 15
United States v. Ceccolini, 435 U.S. 268 (1978) 18
United States v. Green, 111 F.3d 515 (7th Cir. 1997), *cert. denied*, 522 U.S. 973 (1997) 9, 16
United States v. Gross, 662 F.3d 393 (6th Cir. 2011) 9, 12, 13
United States v. Simpson, 439 F.3d 490 (8th Cir. 2006) 10
Wong Sun v. United States, 371 U.S. 471 (1963) 5, 17

STATEMENT

In recent years the Court has denied four certiorari petitions presenting the same question Utah presents here. *Mazuca v. Texas*, No. 12-7773, 133 S. Ct. 1724 (2013); *Faulkner v. United States*, No. 11-235, 132 S. Ct. 761 (2011); *Brendlin v. California*, No. 08-8916, 556 U.S. 1192 (2009); *Frierson v. Florida*, No. 06-6967, 549 U.S. 1082 (2006). Utah's certiorari petition should be denied as well. The lower court conflict alleged in the petition is spurious, the Utah Supreme Court's decision below is correct, and in any event this case would be an exceedingly poor vehicle for addressing the question Utah presents.

1. Detective Doug Fackrell detained respondent Edward Strieff after Strieff left a house that Fackrell was watching. Pet. App. 4. Fackrell knew nothing about Strieff. He had never seen Strieff before. He did not know who Strieff was. He had not seen Strieff enter the house. He did not know how long Strieff had been inside. He did not know whether Strieff lived in the house or had been in the house before. Pet. App. 4-5; R125:4, 7-8.

Fackrell also knew very little about the house. He had been watching the house "off and on for a week or so" for a total of approximately three hours, after an anonymous caller left a message on a drug tip line saying "they believed there was narcotics traffic at the house and they described some short term stay traffic at the house." Pet. App. 4; R125:2-4. Apart from this anonymous tip Fackrell knew nothing about the house. He did not know who owned it,

or who lived in it, or whether any crimes took place inside.

After Fackrell observed "not terribly frequent" short-term traffic at the house, R125:3, he decided he would detain the next person he saw leaving the house. That person turned out to be Strieff. As Fackrell testified, he detained Strieff because "[h]e was coming out of the house that I had been watching and I decided that I'd like to ask somebody if I could find out what was going on [in] the house." Pet. App. 4-5; R125:4. Utah has conceded throughout this case that Fackrell did not have reasonable suspicion to detain Strieff. Pet. App. 5. Rather, Fackrell was engaged in a classic fishing "expedition for evidence in the hope that something might turn up." *Brown v. Illinois*, 422 U.S. 590, 605 (1975).[1]

Fackrell detained Strieff about a block from the house. Pet. App. 4; R125:5. He identified himself as a police officer and told Strieff that "I had been watching the house and that I believed there might be drug activity there and asked him if he would tell me what he was doing there." Pet. App. 5; R125:5. Fackrell could not remember Strieff's response. R125:11.

Fackrell asked for Strieff's identification because he wanted "to know who I'm talking to." R125:6. Fackrell took Strieff's identification and asked dispatch to run a warrants check. Pet. App. 5. The dis-

---

[1] Utah says Fackrell "was a fact or so shy of reasonable suspicion," Pet. 3-4, but this is quite an understatement. Fackrell was nowhere close to having reasonable suspicion.

patcher found a minor traffic warrant. Pet. App. 5. Fackrell arrested Strieff on the warrant and conducted a search, during which he found methamphetamine and paraphernalia in Strieff's pockets. Pet. App. 5.

Utah charged Strieff with possession of methamphetamine and drug paraphernalia. Pet. App. 5. Strieff moved to suppress the evidence found in his pockets, on the ground that the evidence was the fruit of an unconstitutional detention. Pet. App. 5. The state district court determined that although the stop was unconstitutional, Fackrell's discovery of the warrant was an "intervening circumstance" that rendered suppression an "inappropriate remedy." Pet. App. 6.

Strieff entered a conditional guilty plea to misdemeanor attempted possession of a controlled substance and paraphernalia. Pet. App. 6. He reserved the right to appeal the order denying his motion to suppress. Pet. App. 6.

The Utah Court of Appeals affirmed by a vote of 2-1. Pet. App. 37-98. The majority held that the evidence was admissible under the "attenuation" exception to the exclusionary rule recognized in *Brown v. Illinois*, 422 U.S. 590 (1975). Pet. App. 49-84. Judge Thorne, dissenting, concluded that the evidence should have been excluded. Pet. App. 84-98.

2. The Utah Supreme Court unanimously reversed. Pet App. 1-36.

Justice Lee's opinion for the court began by observing that evidence seized after an illegal search or

detention may nevertheless be admitted under three analytically distinct exceptions to the exclusionary rule: (1) the independent source exception, (2) the inevitable discovery exception, and (3) the attenuation exception. Pet. App. 11. Each exception, the court explained, applies to a particular fact situation. Under the independent source exception, evidence may be admitted, despite police misconduct, where the police actually obtained the evidence by lawful means and would have done so even in the absence of the misconduct. Pet. App. 11-13. The inevitable discovery exception applies where the police obtained the evidence by unlawful means but would inevitably have obtained it by lawful means at a subsequent time. Pet. App. 13-14. The attenuation exception applies where the police engaged in unlawful conduct, but the unlawful conduct was not the proximate cause by which the police obtained the evidence, because of an intervening circumstance breaking the causal chain. Pet. App. 14-18.

The Utah Supreme Court then focused on the attenuation exception, the only exception advanced by the state. The court explained that this Court has established "a three-factor test to guide the attenuation inquiry. The three factors are: (1) the 'temporal proximity' of the unlawful detention and the discovery of incriminating evidence, (2) the presence of 'intervening circumstances,' and (3) the 'purpose and flagrancy' of the official misconduct." Pet. App. 18 (quoting *Brown*, 422 U.S. at 603-04).

Under the attenuation exception, the Utah Supreme Court noted, the "prototypical intervening circumstance involves a voluntary act by the defendant,

such as a confession or consent to search given after illegal police action." Pet. App. 18-19. Indeed, the court explained, "the United States Supreme Court's attenuation cases have all involved *confessions* made by unlawfully detained individuals." Pet. App. 20. In such cases, even if police misconduct is the but-for cause of the defendant's confession, "the defendant's voluntary act is sufficiently independent to break the legal connection to the primary violation." Pet. App. 19. The Utah Supreme Court observed that "[u]nder the caselaw, the independence of such voluntary acts is established, for example, where the confession or consent comes well after termination of a defendant's illegal detention, after defendant's consultation with counsel, or as a spontaneous comment not in response to any police interrogation." Pet. App. 19.

The Utah Supreme Court concluded that "attenuation is limited to the circumstances of the cases embracing this doctrine in the Supreme Court—involving a defendant's independent acts of free will." Pet. App. 27. By contrast, "in the distinct circumstances involving the discovery of an outstanding warrant, we conclude that a different doctrine—the inevitable discovery exception—controls." Pet. App. 27.

The Utah Supreme Court provided three reasons for this conclusion.

First, the court observed that the "origins of attenuation are in cases involving independent acts of criminal defendants." Pet. App. 27. This Court's attenuation cases—*Wong Sun v. United States*, 371 U.S. 471 (1963); *Brown v. Illinois*, 422 U.S. 590

(1975); and *Kaupp v. Texas*, 538 U.S. 626 (2003)—"all involved a confession given by a defendant after an initial unlawful arrest." Pet. App. 27-28. The Utah Supreme Court noted that "[t]he seminal decision in *Brown* speaks in terms of whether a defendant's 'statements (verbal acts, as contrasted with physical evidence) were of sufficient free will as to purge the primary taint of the unlawful arrest.'" Pet. App. 28 (quoting *Brown*, 422 U.S. at 600). This focus on the defendant's independent act of free will "cannot easily be extended to the discovery of an outstanding warrant," the court pointed out, because "[t]he discovery of an outstanding warrant is hardly an independent act or occurrence" that could break the causal chain between the police misconduct and the seizure of the evidence. Pet. App. 29.

Second, the Utah Supreme Court emphasized that "[t]he attenuation factors articulated by the Supreme Court also seem to cut in the same direction." Pet. App. 29. One factor is the "'temporal proximity of the arrest and the confession.'" Pet. App. 29 (quoting *Brown*, 422 U.S. at 603). Under this factor, the longer the time lapse between the police misconduct and the defendant's confession, the more likely there has been a break in the causal chain between the two. But "applying this factor to the discovery of an independent warrant would turn the inquiry on its head," the Utah Supreme Court observed. Pet. App. 30. "In the context of an unlawful detention followed by a warrants check, temporal delay would logically count in favor of the government." Pet. App. 30. But this would make no sense, because "[t]he constitutional violation in a *Terry* stop, after all, is a product

of the unreasonable delay associated with an individual's detention by the government." Pet. App. 30. The Utah Supreme Court concluded: "the government could hardly assert the lack of 'temporal proximity' in the discovery of a search warrant as a basis for attenuation (and thus avoidance of the exclusionary rule)." Pet. App. 30.

The Utah Supreme Court added that another *Brown* factor—the "purpose and flagrancy" of the police misconduct—"is also ill-suited to the outstanding warrant scenario." Pet. App. 30. This factor focuses "on the 'manner in which [the defendant's] arrest was affected,' with particular attention to whether that 'manner' gave 'the appearance of having been calculated to cause surprise, fright, and confusion.'" Pet. App. 30 (quoting *Brown*, 422 U.S. at 605). As the Utah Supreme Court explained, this factor "is an outgrowth of the inquiry into proximate causation, as a purposeful attempt at 'surprise, fright, and confusion' could predictably yield a confession that would be entirely foreseeable (and thus connected to—and hardly independent of—the primary police misconduct)." Pet. App. 30. The court concluded that this "assessment would have little application to the outstanding warrant scenario, where 'surprise, fright, and confusion' are utterly irrelevant." Pet. App. 30-31.

The Utah Supreme Court's third reason for finding the attenuation exception inapplicable was that "extension of the attenuation doctrine to the outstanding warrant scenario would eviscerate the inevitable discovery exception." Pet. App. 31. The court explained that under the inevitable discovery excep-

tion, "where lawful police work runs in tandem with an illegal parallel, the taint of the latter is tough to eliminate." Pet. App. 32. Under *Nix v. Williams*, 467 U.S. 431 (1984), "our law does not lightly excuse an initial Fourth Amendment violation on the ground that it was paralleled by a lawful investigation. Instead we insist on exclusion unless the fruits of the lawful investigation would *inevitably* have come about regardless of the unlawful search or seizure." Pet. App. 32.

The court worried that "[e]xtension of the attenuation doctrine to this scenario would blur the lines of the inevitable discovery exception," by watering down the inevitability requirement. Pet. App. 33. "If attenuation is a free-wheeling doctrine unmoored from voluntary acts of a defendant's free will, then the limits of the *Nix* formulation of inevitable discovery would be substantially curtailed." Pet. App. 33. The court observed that "[i]f *Brown*, and not *Nix*, prescribes the standard for *lawful* police conduct removing the taint from *unlawful* acts, then *inevitablity* would no longer be the standard. Instead, it would be enough for the prosecution to assert that an initial act of police misconduct was insufficiently 'purposeful and flagrant' and lacking in 'temporal proximity' to a lawful investigation to sustain exclusion." Pet. App. 33. The court concluded: "We cannot adopt this premise without overriding the *Nix* formulation of the inevitable discovery exception." Pet. App. 34.

For these reasons, the Utah Supreme Court held that the appropriate exception for the facts of this case is inevitable discovery, not attenuation. Pet.

App. 34. Because the state had argued only for attenuation, and not for inevitable discovery, the Utah Supreme Court reversed without analyzing whether the evidence would have been admissible under the inevitable discovery exception. Pet. App. 34.

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied. The lower court conflict alleged in the petition is spurious. The decision below is correct. And in any event the facts of this case make it an extremely poor vehicle for addressing the question Utah presents.

I. The lower court conflict alleged in the certiorari petition does not exist.

The certiorari petition asserts a three-way conflict among the federal circuits and state supreme courts. Pet. 8-17. But this supposed conflict evaporates upon close inspection. With two very recent exceptions (the Utah Supreme Court decision in this case and an even more recent decision of the Nevada Supreme Court, both of which will be discussed below), all these cases apply the three factors established in *Brown v. Illinois*, 422 U.S. 590 (1975). The cases reach different outcomes, because they apply the *Brown* factors to widely divergent sets of facts, but these courts are all applying the same law. *United States v. Gross*, 662 F.3d 393, 401-06 (6th Cir. 2011) (applying the *Brown* factors and determining that some evidence should have been suppressed while other evidence should have been admitted); *United States v. Green*, 111 F.3d 515, 521-23 (7th Cir. 1997) (applying the *Brown* factors and determining that

evidence should have been admitted), *cert. denied*, 522 U.S. 973 (1997); *United States v. Simpson*, 439 F.3d 490, 494-96 (8th Cir. 2006) (applying the *Brown* factors and determining that evidence should have been admitted); *State v. Hummons*, 253 P.3d 275, 277-79 (Ariz. 2011) (applying the *Brown* factors and determining that evidence should have been admitted); *People v. Brendlin*, 195 P.3d 1074, 1079-81 (Cal. 2008) (applying the *Brown* factors and determining that evidence should have been admitted), *cert. denied*, 556 U.S. 1192 (2009); *People v. Padgett*, 932 P.2d 810, 816-17 (Colo. 1997) (citing its own precedent applying the *Brown* factors and finding that evidence should have been suppressed because the "temporal proximity" factor cut strongly in the defendant's favor); *State v. Frierson*, 926 So. 2d 1139, 1143-45 (Fla. 2006) (applying the *Brown* factors and determining that evidence should have been admitted), *cert. denied*, 549 U.S. 1082 (2006); *State v. Page*, 103 P.3d 454, 458-60 (Idaho 2004) (applying the *Brown* factors and determining that evidence should have been admitted); *State v. Moralez*, 300 P.3d 1090, 1100-04 (Kan. 2013) (applying the *Brown* factors and determining that evidence should have been suppressed); *State v. Hill*, 725 So. 2d 1282, 1284-87 (La. 1998) (applying the *Brown* factors and determining that evidence should have been admitted); *Cox v. State*, 916 A.2d 311, 321-24 (Md. 2007) (applying the *Brown* factors and determining that evidence should have been admitted); *State v. Grayson*, 336 S.W.3d 138, 147-48 (Mo. 2011) (applying the *Brown* factors and determining that evidence should have been suppressed); *State v. Thompson*, 438 N.W.2d 131, 137 (Neb. 1989) (applying *Brown* and

determining that evidence should have been admitted); *State v. Shaw*, 64 A.3d 499, 508-12 (N.J. 2012) (applying the *Brown* factors and determining that evidence should have been suppressed); *Jacobs v. State*, 128 P.3d 1085, 1087-89 (Okla. Ct. Crim. App. 2006) (applying the *Brown* factors and determining that evidence should have been admitted); *State v. Bailey*, 338 P.3d 702, 713-15 (Or. 2014) (applying the *Brown* factors and determining that evidence should have been suppressed); *State v. Mazuca*, 375 S.W.3d 294, 300-10 (Tex. Ct. Crim. App. 2012) (applying the *Brown* factors and determining that evidence should have been admitted), *cert. denied*, 133 S. Ct. 1724 (2013).

Utah tries to manufacture a split among these cases by selectively quoting from them. The first of Utah's purported categories consists of cases Utah characterizes as excluding evidence "only if the police engaged in flagrant misconduct." Pet. 8. But "flagrancy of the official misconduct" is one of the *Brown* factors, 422 U.S. at 604, so it is hardly surprising that these cases would consider it along with the other two factors. Indeed, all of the cases applying *Brown*, in all three of Utah's claimed categories, consider the flagrancy of the police misconduct, along with the other two *Brown* factors, in the course of their analysis. All of these cases, in all three of Utah's ostensible categories, recognize that police misconduct is flagrant where, as here, the officer unlawfully detains the defendant "in the hope that something might turn up." *Id.* at 605. As with any multi-factor test, different factors will be more or less prominent in different fact situations, so it is

again not surprising that in some cases the "flagrancy" factor has been more pivotal than in others. Regardless of the weight given to particular factors in any given case, all these courts are applying the same test.

Utah's second purported category consists of five cases that Utah characterizes as holding that "evidence seized incident to a warrant-arrest will always be excluded." Pet. 12. But this characterization is incorrect. None of these cases holds that evidence will always be excluded.

Two of the cases that Utah lists in this category are the decision in this case and an even more recent decision of the Nevada Supreme Court. These cases will be discussed in more detail below. For now, it suffices to note that neither case holds that evidence will always be excluded. These cases simply hold that the admissibility of the evidence is governed by a different exception to the exclusionary rule.

The remaining three cases Utah places in this category likewise do not hold that the evidence will always be excluded. In *Gross*, the Sixth Circuit held that "where there is a stop with no legal purpose, the discovery of a warrant during that stop may be a relevant factor in the intervening circumstance analysis, but it is not by itself dispositive." 662 F.3d at 404. The Sixth Circuit accordingly gave considerable attention to the other two *Brown* factors. The court concluded that "[i]n view of the time that elapsed between the unlawful seizure of Gross" and his subsequent confession, "the first factor weighs significantly toward attenuation." *Id.* at 402. It further con-

cluded that the officer's conduct, although "disheartening," *id.* at 405, was not particularly flagrant and could thus be considered "a wash," *id.* at 406. Far from holding that evidence would always be excluded, the Sixth Circuit held that under the *Brown* test some evidence would be admitted while other evidence would be excluded. *Id.*

In *Moralez*, the Kansas Supreme Court likewise looked to all three *Brown* factors. 300 P.3d at 1100-03. The court explicitly held that "the three factors generally considered in performing an attenuation analysis—temporal proximity, presence of intervening circumstances, and purpose and flagrancy of police misconduct—are not exclusive, nor are they necessarily entitled to equal weight. Instead, consideration of all relevant factors will necessarily depend on the particular facts presented in each case." *Id.* at 1103. Finally, in *Padgett* the Colorado Supreme Court found no attenuation where the "temporal" factor was so "glaring" as to point heavily in the defendant's favor, 932 P.2d at 817, and where the government had not even shown that an arrest warrant existed in the first place, *id.* at 816-17. None of these cases holds that "evidence seized incident to a warrant-arrest will always be excluded." Pet. 12.

Utah's third purported category includes three cases which Utah characterizes as holding that "evidence seized incident to a warrant-arrest will never be excluded." Pet. 15. But these cases do not take this position. The Seventh Circuit case is inapposite: It involved the lawfulness of an *arrest* pursuant to a warrant, not the admissibility of evidence found in a search incident to that arrest. *Atkins v. City of Chi-*

cago, 631 F.3d 823, 826-27 (7th Cir. 2011). The Nebraska Supreme Court did not hold that evidence obtained incident to a warrant-arrest could *never* be excluded. The court merely held that on the facts of the case, under *Brown* "[t]he connection between the illegal stop and the outstanding robbery warrant was so attenuated as to dissipate the taint of the illegal stop." *Thompson*, 438 N.W.2d at 137. The third case is from an intermediate state appellate court, and even that one does not fit Utah's description. In *State v. Cooper*, 579 S.E.2d 754, 757-58 (Ga. Ct. App. 2003), the Georgia Court of Appeals found sufficient attenuation on the particular facts of the case.

Utah's asserted three-way split is thus fanciful, because courts in all three of its claimed categories apply the *Brown* factors to determine whether the seizure of evidence is sufficiently attenuated from the wrongful stop of the defendant.[2]

Very recently, two state supreme courts have held that in these circumstances attenuation is the wrong exception to the exclusionary rule. One is of course the Utah Supreme Court in the decision below. The other is the Nevada Supreme Court. *Torres v. State*, 341 P.3d 652, 658 (Nev. 2015) ("We do not perceive the *Brown* factors as particularly relevant when, as here, there was no demonstration of an act of free

---

[2] In the decision below, the Utah Supreme Court noted that different lower courts, in applying the *Brown* factors, have placed different weights on different factors, Pet. App. 21-25, an inevitable outcome when a multi-factor test is applied to a wide range of factual circumstances. The split alleged in the certiorari petition is completely different from the Utah Supreme Court's description of the cases.

will by the defendant to purge the taint caused by an illegal seizure."). Review by this Court would be unwarranted, however, for three reasons.

First, all the lower courts agree, whether or not they use the attenuation exception, that evidence must be excluded where, as in this case, the police conduct a fishing expedition—an illegal detention undertaken "in the hope that something might turn up." *Brown*, 422 U.S. at 605. *See, e.g.*, *Moralez*, 300 P.3d at 1103 (explaining that evidence must be excluded "when law enforcement officers approach random citizens, request identification, and run warrants checks for no apparent reason"); *Grayson*, 336 S.W.3d at 148 ("Such a fishing expedition is precisely the sort of overreaching police behavior that the exclusionary rule is intended to deter."); *Bailey*, 338 P.3d at 714 (explaining that evidence must be excluded where the police detain a defendant "'for investigation' or for 'questioning'") (quoting *Brown*, 422 U.S. at 605); *Brendlin*, 195 P.3d at 1081 (noting that evidence must be excluded if a detention is "undertaken as a fishing expedition"); *Torres*, 341 P.3d at 657 (explaining that the officer had no reason to detain the defendant other than the officer's hope of finding illegal activity).

Second, none of the courts that apply the *Brown* attenuation factors has yet had the opportunity to consider the thorough analysis in the decision below. The Utah Supreme Court's careful opinion is the first in any jurisdiction to address at length whether the attenuation exception or the inevitable discovery exception is the proper exception to the exclusionary rule for this situation. The earliest courts that ap-

plied the attenuation exception simply assumed that it was appropriate, without any explicit consideration of the alternatives. *See, e.g.*, *Green*, 111 F.3d at 521. The later courts that applied the attenuation exception by and large followed the earlier ones, again without any consideration of the alternatives. *See, e.g.*, *Brendlin*, 195 P.3d at 1079 (citing *Green* and several other cases). These courts will now almost certainly be asked, in appropriate cases, to reconsider their view in light of the Utah Supreme Court's decision. They should be given that opportunity. As we will discuss in more detail below, the Utah Supreme Court decision is so clearly correct that the other courts are very likely to agree with it.

Third, neither the Utah Supreme Court in this case nor the Nevada Supreme Court in *Torres* addressed whether the evidence at issue would have been admissible under the inevitable discovery exception, because the state did not argue that theory in either case. We thus do not know whether substituting inevitable discovery for attenuation will have any concrete effect on the outcomes of cases. Before this Court grants review, it would be prudent to wait for some cases to be decided under the inevitable discovery exception, so the Court will have some sense of whether anything is at stake.

II. The decision below is correct.

Justice Lee's opinion for the unanimous Utah Supreme Court is the clearest and most intelligent discussion of this issue yet written. It demonstrates beyond dispute that the attenuation exception pertains only to cases in which an intervening act of the de-

fendant's free will breaks the causal chain between the police misconduct and the acquisition of the evidence sought to be admitted. The attenuation exception does not apply in the very different context of the discovery of an arrest warrant after an unlawful detention.

All of this Court's attenuation cases have involved confessions, and in all of them the Court has emphasized that the intervening factor breaking the causal chain is an independent act of free will on the part of the defendant. In the case that first discussed the attenuation exception, *Wong Sun*, the Court noted the possibility that a defendant's statement to the police after an unlawful arrest might be admissible, if it resulted from "an intervening independent act of a free will" on the defendant's part. 371 U.S. at 486. In *Brown*, the Court held that "[t]he question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case." 422 U.S. at 603. The Court then enumerated the three factors it has consulted ever since—the "temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." *Id.* at 603-04 (citation and footnotes omitted). The Court added that "[t]he voluntariness of the statement is a threshold requirement," *id.* at 604, a comment that confirms that the attenuation exception is confined to voluntary acts of the defendant in the aftermath of police misconduct.

The Court's subsequent attenuation cases have all likewise turned on whether a defendant's confession was the product of police misconduct or the product

of the defendant's own free will.[3] *See Dunaway v. New York*, 442 U.S. 200, 219 (1979) ("No intervening events broke the connection between petitioner's illegal detention and his confession."); *United States v. Ceccolini*, 435 U.S. 268, 279 (1978) ("The evidence indicates overwhelmingly that the testimony given by the witness was an act of her own free will in no way coerced or even induced by official authority."); *Taylor v. Alabama*, 457 U.S. 687, 690-91 (1982) ("Petitioner was arrested without probable cause in the hope that something would turn up, and he confessed shortly thereafter without any meaningful intervening event."); *Kaupp*, 538 U.S. at 632 ("Since Kaupp was arrested before he was questioned, and because the State does not even claim that the sheriff's department had probable cause to detain him at that point, well-established precedent requires suppression of the confession unless that confession was an act of free will sufficient to purge the primary taint of the unlawful invasion.") (quotation marks and brackets omitted).

As the Utah Supreme Court correctly observed, Pet. App. 29, attenuation cannot sensibly be extended to the discovery of an outstanding warrant, be-

---

[3] Utah erroneously claims *Johnson v. Louisiana*, 406 U.S. 356 (1972), as an exception to this rule, Pet. 21, apparently because *Johnson* cites *Wong Sun*, but *Johnson* was not an attenuation case. *Id.* at 365 (explaining that a lineup was properly conducted because the defendant was lawfully in custody by virtue of commitment by a magistrate). Utah also erroneously cites *United States v. Ceccolini*, 435 U.S. 268 (1978) as an exception, Pet. 21, but *Ceccolini* held that "[t]he evidence indicates overwhelmingly that the testimony given by the witness was an act of her own free will." *Id.* at 279.

cause, unlike a spontaneous confession by the defendant, the discovery of a warrant is never an independent act or occurrence. It is a natural and foreseeable consequence of the initial detention, because the police routinely run computer checks of people they detain. The discovery of a warrant could never truly be an "intervening" circumstance, *Brown*, 422 U.S. at 603, like a statement made by a defendant of his own free will.

Moreover, the three *Brown* factors that govern the attenuation exception lose their meaning when they are transposed to the very different factual setting of the discovery of an arrest warrant. The first factor is the "temporal proximity of the arrest and the confession." *Id.* That is, the longer the delay between the wrongful arrest and the confession, the more likely the confession is to be a product of the defendant's free will, and the less likely it is to have been proximately caused by the wrongful arrest. This factor makes no sense in the warrant context. To begin with, the discovery of a warrant virtually always comes immediately after the detention of the defendant. Unlike confessions, warrants do not spontaneously arise after a long delay. Worse, as the Utah Supreme Court pointed out, Pet. App. 29-30, the longer the delay, the more egregious the *Terry* violation. Applying this *Brown* factor to the warrant context thus rewards the government for the worst police misconduct.

The second *Brown* factor is "the presence of intervening circumstances." *Id.* at 603-04. This makes sense for confessions, because all sorts of things can happen between an arrest and a confession. A de-

fendant's friends or family might counsel him to confess. A defendant might be stricken with remorse. A defendant might decide to implicate a confederate in the hope of leniency. These are all intervening circumstances that might break the causal chain between an unlawful arrest and a subsequent confession. Again, however, this factor loses its meaning when transposed to the very different context of the discovery of a warrant. If the "intervening circumstance" is the discovery of the warrant, then this circumstance is present, and indeed it is identical, in every single case, so it would be nonsensical to consider it as a factor.

The third *Brown* factor is "the purpose and flagrancy of the official misconduct." *Id.* at 604. This makes sense as applied to confessions, because the more the police deliberately try to frighten or confuse the defendant, the more likely the defendant's confession is to be a product of the police misconduct, and the less likely the confession is to be a product of the defendant's own free will. But it makes no sense as applied to the discovery of warrants. In deciding whether the discovery of a warrant was proximately caused by the police's unlawful detention of a defendant, it makes no difference whether the police detain the defendant in a frightening or confusing way. The three *Brown* factors thus cannot be woodenly transposed from confessions to the discovery of warrants.

Finally, as the Utah Supreme Court rightly emphasized, Pet. App. 31-34, extending the attenuation exception beyond voluntary acts of the defendant would eviscerate the inevitable discovery exception.

In any case that does not satisfy the requirements of inevitable discovery, the government would simply argue that the initial act of police misconduct was not "flagrant" and that there was no "temporal proximity" between the police misconduct and the subsequent discovery of the evidence. If the inevitable discovery exception could be so easily circumvented, it would have ceased to have any meaning long ago.

For these reasons, the Utah Supreme Court's opinion is correct. Inevitable discovery, not attenuation, is the appropriate exception to the exclusionary rule in this situation.

III. The facts of this case make it a poor vehicle for addressing the question presented, because the evidence would be suppressed even under Utah's view of the law.

Utah proposes to dispense entirely with the first two *Brown* factors. Pet. 19-22 (arguing that the discovery of a warrant is always an intervening circumstance of sufficient magnitude), Pet. 25 (arguing that "*Brown*'s temporal proximity factor is not relevant"). Instead, Utah invents a new test more government-friendly than any that has ever been adopted by any court, under which evidence would always be admitted unless the police make "random, dragnet-type, or otherwise arbitrary stops." Pet. 22. Such a test could not be adopted without twisting the attenuation exception beyond recognition and eviscerating the inevitable discovery exception. Even putting these objections aside, however, this case would be an exceedingly poor vehicle for deciding whether Utah's view

of the law is correct, because the police misconduct in this case was precisely the kind of random, arbitrary detention that would be forbidden even under Utah's unorthodox test.

According to Detective Fackrell's own testimony, after watching a house on and off for a total of three hours over the course of a week, he decided to stop someone who was leaving the house to see if he could find out what was going on inside. Fackrell did not have any particular person in mind. Edward Strieff happened to be the first person who walked out of the house after Fackrell formulated this plan. That is why Fackrell happened to stop Strieff rather than someone else. Fackrell had no idea whether Strieff was a short-term visitor, or a permanent resident, or the pizza delivery man. Fackrell stopped him utterly at random.[4]

In short, this was a random, arbitrary stop. Even under Utah's proposed rule, the evidence would be suppressed. That makes this case a poor vehicle for deciding whether Utah's unorthodox view of the law is correct.

---

[4] Amici's discussion of police officers' "good faith," Br. of Amici Michigan et al. 5-18, is thus misplaced in this case. The purpose of the exclusionary rule is precisely to deter officers from conducting such fishing expeditions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

STUART BANNER
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095

PATRICK L. ANDERSON
JOAN C. WATT
Counsel of Record
Salt Lake Legal Defender Association
424 E. 500 South, Ste. 300
Salt Lake City, UT 84111
(801) 532-5444
jwatt@sllda.com

Supreme Court, U.S.
FILED
JUL 14 2015
OFFICE OF THE CLERK

No. 14-1373

In the
Supreme Court of the United States

STATE OF UTAH,
Petitioner,

vs.

EDWARD JOSEPH STRIEFF, JR.,
Respondent.

On Petition for a Writ of Certiorari
to the Utah Supreme Court

Reply Brief of Petitioner

SEAN D. REYES
Utah Attorney General
JEFFREY S. GRAY*
Assistant Attorney General
BRIDGET ROMANO
Utah Solicitor General
LAURA DUPAIX
Criminal Appeals Director
Counsel for Petitioner
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180
Email: jgray@utah.gov

**Counsel of Record*

TABLE OF CONTENTS

Table of Contents i
Table of Authorities ii
A. The split among lower courts is real and growing 2
1. The excludes-evidence-only-if-flagrant camp. 3
2. The always-excludes-evidence camp. 4
3. The never-excludes-evidence camp 7
B. Contrary to the opinion below, the attenuation doctrine applies to the outstanding warrant scenario. 9
C. This case presents an ideal vehicle for addressing the attenuation question in outstanding warrant cases. 13
CONCLUSION 14

TABLE OF AUTHORITIES

FEDERAL CASES

Atkins v. City of Chicago, 631 F.3d 823 (7th Cir. 2011) 8

Brown v. Illinois, 422 U.S. 590 (1975) 3, 12

Johnson v. Louisiana, 406 U.S. 356 (1972) 10, 11

Nix v. Williams, 467 U.S. 431 (1984) 12

United States v. Ceccolini, 435 U.S. 268 (1978) 11

United States v. Crews, 445 U.S. 463 (1980) 12

United States v. Faulkner, 636 F.3d 1009 (8th Cir.), *cert. denied*, 132 S.Ct. 761 (2011) 8

United States v. Green, 111 F.3d 515 (7th Cir.), *cert. denied*, 522 U.S. 973 (1997) 3, 4, 8

United States v. Gross, 662 F.3d 393 (6th Cir. 2011) 4, 5

United States v. Leon, 468 U.S. 897 (1984) 12

Wong Sun v. United States, 371 U.S. 471 (1963) 11

STATE CASES

People v. Brendlin, 195 P.3d 1074 (Cal. 2008), *cert. denied*, 556 U.S. 1192 (2009) 8

People v. Padgett, 932 P.2d 810 (Colo. 1997) 4, 5

State v. Cooper, 579 S.E.2d 754 (Ga. App. 2003) 7

State v. Frierson, 926 So.2d 1139 (Fla.), *cert. denied*, 549 U.S. 1082 (2006) 8, 10

State v. Mazuca, 375 S.W.3d 294 (Tex. Crim. App. 2012), *cert. denied*, 133 S.Ct. 1724 (2013) 8

State v. Moralez, 300 P.3d 1090 (Kan. 2013) 4, 5, 6

State v. Thompson, 438 N.W.2d 131 (Neb. 1989) 7

Torres v. State, 341 P.3d 652 (Nev. 2015), *cert. pending*, Case No. 15-5 9

No. 14-1373

In the
Supreme Court of the United States

STATE OF UTAH,
Petitioner,

vs.

EDWARD JOSEPH STRIEFF, JR.,
Respondent.

On Petition for a Writ of Certiorari
to the Utah Supreme Court

Reply Brief of Petitioner

The question presented is whether evidence acquired incident to a lawful warrant-arrest should be suppressed because police learned of the warrant during an investigatory stop later found to be unlawful. Over the past two decades, the federal courts of appeals and state high courts have become deeply divided over the answer to that question and even how to analyze it. The recent decisions in Utah and Nevada have only deepened that divide.

Strieff's effort to deny the conflict is unavailing, as is his suggestion that this case is anything other than an ideal vehicle through which to resolve it. Nor is his attempt to defend the Utah Supreme Court's holding and reasoning any more successful—it cannot be reconciled with this Court's attenuation precedents and its exclusionary rule doctrine. The time has come for this Court to decide the issue.

A. The split among lower courts is real and growing.

Strieff concedes that the Utah and Nevada Supreme Court expressly held that, in conflict with virtually every other court to address the issue, the attenuation doctrine is inapposite. Br. in Opp. 14-15. He also concedes (Br. 15-16) that the Utah and Nevada Supreme Courts adopted a rule that will lead to different results than in many other federal circuits and state high courts. In Utah and Nevada, evidence obtained in a search incident to a lawful arrest following an unlawful seizure is only admissible if, as a fortuitous matter, the evidence would have inevitably been discovered anyway. Absent inevitable discovery, the evidence must be excluded. By contrast, two federal courts of appeal and 11 state high courts would admit that evidence, even if it would not inevitably have been found, unless the police engaged in flagrant misconduct when they initially seized the defendant. *See* Pet. 9-10. And as discussed further below, several additional courts would admit that evidence regardless of whether the police engaged in flagrant misconduct. *See* Pet. 15-16.

This acknowledged conflict between the Utah and Nevada Supreme Courts, on the one hand, and well over a dozen other courts around the nation, on the other, alone justifies a grant of certiorari. But contrary to Strieff's contention (Br. 9-16), the conflict among the courts is far deeper than that. The lower

courts have not merely applied the three-factor inquiry articulated in *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), to different facts and thereby reached differing results. The courts have divided into discrete, outcome-determinative camps based on the different weight they give the different factors in this context.

1. The excludes-evidence-only-if-flagrant camp.

In 1997, the Seventh Circuit held that under *Brown's* three-factor inquiry, an intervening warrant-arrest purges the taint of a prior, unlawful stop unless the illegality was flagrant. *United States v. Green*, 111 F.3d 515, 521-23 (7th Cir.), *cert. denied*, 522 U.S. 973, (1997). Over time, *Green's* analysis became the majority approach.

Courts in the *Green* camp treat *Brown's* close temporal proximity factor as basically irrelevant in the warrant context because any illegality in making the stop does not affect the lawfulness of the warrant-arrest itself. *See Green*, 111 F.3d at 522; Pet. 11. In contrast, they treat the warrant-arrest as "an even more compelling" intervening event than that found in confession cases, precisely because—unlike a confession—there is no danger that the warrant resulted from police misconduct during the stop. *Green*, 111 F.3d at 522. Attenuation in this camp thus turns on *Brown's* flagrancy factor: evidence seized incident to the intervening warrant-arrest is

usually admitted; it is suppressed only if the police illegality was flagrant. *Id.* at 521, 523.

Strieff thus misses the point when he says (Br. 11) that these courts "consider" flagrancy "along with the other two factors." They do more than *consider* that factor; they treat it as outcome-determinative.

As the State explained in its petition, most lower courts to address the issue have adopted *Green's* approach. *See* Pet. 8-12. But not all have, including courts that apply the *Brown* factors, but in a very different way.

2. The always-excludes-evidence camp.

The Sixth Circuit and four state high courts have adopted approaches that invariably lead to the exclusion of evidence found incident to a lawful arrest following an unlawful seizure. Three of those courts consider the *Brown* factors: *United States v. Gross*, 662 F.3d 393 (6th Cir. 2011); *People v. Padgett*, 932 P.2d 810 (Colo. 1997); *State v. Moralez*, 300 P.3d 1090 (Kan. 2013). But their attenuation analysis is very different than *Green's* because of the relative importance they assign to the various *Brown* factors—particularly, close temporal proximity.

Whereas the *Green* camp holds that close temporal proximity between the illegality and discovery of evidence is immaterial, the Sixth Circuit and the Kansas and Colorado Supreme Courts treat the close

temporal proximity between the seizure and the search incident to arrest as fatal to attenuation—whether or not the prior illegality was flagrant.

In *Gross*, the Sixth Circuit held that although the illegality of the stop "would [not] have been clear" to the officer (a nonflagrant violation under *Green*), the intervening warrant-arrest did "not suffice to break the chain of causation" where the challenged evidence "was found just a short time after" the defendant was arrested and jailed on the warrant. 662 F.3d at 405-06. Unlike courts in the *Green* camp, *Gross* held that close temporal proximity "weighs *significantly* toward attenuation." *Id.* at 402 (emphasis added). In *Padgett*, the Colorado Supreme Court held that the intervening warrant-arrest was insufficient to purge the taint of the unlawful stop because the "temporal and geographical proximity" of the unlawful stop to the discovery of evidence was so "glaring"—the whole encounter lasted only "four to fifteen minutes." 932 P.2d at 817. And in *Moralez*, the Kansas Supreme Court held that close temporal proximity "weighs heavily" against attenuation, and treated the warrant-arrest as an intervening event of only "minimal importance"—"neither weighing in

favor of nor against suppression." 300 P.3d at 1103-04.[1]

In sum, these courts' heavy emphasis on close temporal proximity between an unlawful detention and the discovery of evidence effectively precludes application of the attenuation doctrine to the outstanding warrant scenario—because, as Strieff concedes, "[t]he discovery of a warrant virtually always comes immediately after the detention of the defendant." *See* Br. in Opp. 19. Thus, the different outcomes found in decisions in the *Green* and *Gross* camps are not explained by varying facts, but rather by different standards. Pet. 11.

These divides are real. And the recent decisions in this case and in Nevada have only deepened that divide. The State in its petition grouped the Utah and Nevada Supreme Courts with the Sixth Circuit and Colorado and Kansas Supreme Courts because in all of these jurisdictions a warrant-arrest can never result in attenuation under their rationale. *See* Pet. 12-14. But the Utah and Nevada cases may also be understood as creating yet another camp, consisting of courts holding that the attenuation doctrine

---

[1] *Moralez* also treated the illegality at issue as flagrant, appearing to equate flagrancy with any "investigative detention" not "supported by reasonable suspicion." *Id.* at 1104. But this formulation is a much different standard than that applied by the *Green* camp. *See* Pet. 22.

has no application at all to the outstanding warrant scenario. This only widens the divide.

3. The never-excludes-evidence camp.

The Sixth Circuit and Colorado, Kansas, Nevada, and Utah Supreme Courts' approaches do not merely conflict with the many courts in the *Green* camp. They also conflict with the decisions in *State v. Thompson*, 438 N.W.2d 131 (Neb. 1989), and *State v. Cooper*, 579 S.E.2d 754 (Ga. App. 2003), which effectively created a *per se* rule of attenuation in warrant cases without applying the *Brown* factors.

Thompson cited *Brown* in support of the proposition that an arrest on a warrant is "based on a source completely independent" of the initial unlawful stop. 438 N.W.2d at 137. And *Cooper* did not cite *Brown* at all. Neither court considered the *Brown* factors, much less applied them. In *Thompson*, the arresting officer's claim that he stopped the car in response to a dispatch report was refuted by the dispatch recording. 438 N.W.2d at 135-37. And in *Cooper*, the arresting officer conceded that he extended the traffic stop to investigate drugs even though, apart from the driver's nervousness, "he had no reason to believe there was contraband" in the car. 579 S.E.2d at 755. These two courts did not consider either temporal proximity or flagrancy in their analysis. Simply put, *Thompson* and *Cooper* did *not* apply the "same test" used in *Green*. And their anal-

yses in effect created a *per se* rule of attenuation—unlike *Green*.[2]

* * *

There being no serious doubt that the Utah and Nevada Supreme Court decisions deepened an existing conflict, Strieff suggests (Br. 1) that certiorari is somehow not warranted because the Court has previously denied certiorari on this issue. *See Green*, 111 F.3d 515, 520-24 (7th Cir.), *cert. denied*, 522 U.S. 973 (1997); *United States v. Faulkner*, 636 F.3d 1009, 1014-17 (8th Cir.), *cert. denied*, 132 S.Ct. 761 (2011); *People v. Brendlin*, 195 P.3d 1074, 1078-81 (Cal. 2008), *cert. denied*, 556 U.S. 1192 (2009); *State v. Frierson*, 926 So.2d 1139, 1143-45 (Fla.), *cert. denied*, 549 U.S. 1082 (2006); *State v. Mazuca*, 375 S.W.3d 294, 306-10 (Tex. Crim. App. 2012), *cert. denied* 133 S.Ct. 1724 (2013). Of course, that ignores two salient differences between this petition and those petitions.

First, in each of those cases, the lower court applied the majority rule, and the evidence—obtained

---

[2] Strieff also contends that the State's reliance on *Atkins v. City of Chicago*, 631 F.3d 823 (7th Cir. 2011), is misplaced because it involved the lawfulness of an arrest rather than the admissibility of evidence. Br. in Opp. 13. The State acknowledged in its petition that *Atkins*' language on this score was dicta, but that dicta addressed *Green* directly and strongly suggests that evidence seized incident to a warrant-arrest is never subject to suppression. *See* Pet. 16-17.

in a lawful search incident to a lawful arrest—was not suppressed because the police did not engage in flagrant misconduct. This Court likely saw no reason to disturb those eminently sensible results.

Second, all of those petitions were filed before the Kansas, Utah, and Nevada Supreme Court decisions excluding such evidence; and two of them were filed before the Sixth Circuit decided *Gross*. Until recently, then, the jurisdictions that excluded evidence in the situation at issue here could have been seen as outliers. No longer.

The Court is again asked to review the issue—this time in two cases holding that the attenuation doctrine is wholly inapplicable to the outstanding warrant scenario—in this case and in *Torres v. State*, 341 P.3d 652 (Nev. 2015), *cert. pending*, Case No. 15-5.[3] The time has arrived for the Court to decide the matter.

B. Contrary to the opinion below, the attenuation doctrine applies to the outstanding warrant scenario.

Strieff admits to the divide created by the Utah and Nevada decisions (Br. 9), but contends that the

---

[3] The outstanding warrant issue is the second of two questions presented in the Nevada case. The first question presented in that case is whether there was an unlawful detention to begin with.

Court should nonetheless decline to resolve the conflict. He claims that other courts have not had the opportunity to weigh in on the Utah court's rationale because it is the first to posit the theory, and that the opinion is "so clearly correct" that, given time, other courts are likely to follow suit. Br. in Opp. 15-17. He is doubly wrong.

As the Utah Supreme Court itself recognized (Pet. App. 25-26), the argument that the attenuation doctrine is limited to intervening circumstances involving a defendant's independent acts of free will was made in 2006 in a dissent in *Frierson*, 926 So.2d at 1148-51 (Pariente, C.J., dissenting). This theory of inapplicability has thus been around for nine years—and was set forth before many of the decisions that comprise the majority position.

More fundamentally, this Court should not permit the theory to gain momentum, because it is wrong. Strieff, like the Utah Supreme Court, claims that this Court has applied the attenuation doctrine only in cases involving confessions by defendants. Br. in Opp. 17-18. But as explained in the State's petition, that is not the case. *See* Pet. 21. Contrary to Strieff's claim (Br. 18 at n.3), this Court in *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972), applied the attenuation doctrine to conclude that a lineup identification should not be excluded as a "forbidden fruit" of the defendant's unlawful arrest. The Court treated the defendant's commitment by a magistrate as an

intervening circumstance purging any taint: "At the time of the lineup, the detention of the appellant was under the authority of this commitment. Consequently, the lineup was conducted not by 'exploitation' of the challenged arrest but 'by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

And in *United States v. Ceccolini*, 435 U.S. 268 (1978), which applied the attenuation doctrine in the context of a witness's testimony (not a defendant's confession), this Court implicitly recognized that factors like "free will" may be relevant in one attenuation context, e.g., confessions or witness testimony, but irrelevant in another, e.g., seizure of evidence: "Attenuation analysis, appropriately concerned with the differences between live-witness testimony and inanimate evidence, can consistently focus on [one set of] factors . . . with respect to the former, but on different factors with respect to the latter." *Id.* at 278-79. In short, this Court has never suggested that attenuation is limited to confession cases.

Strieff, like the Utah Supreme Court below, also argues that applying the attenuation doctrine to the outstanding warrant scenario would "eviscerate the inevitable discovery exception." Br. in Opp. 16, 20-21. That too is wrong.

The independent source, inevitable discovery, and attenuation doctrines are related but independ-

ent exceptions to the exclusionary rule. *See United States v. Crews*, 445 U.S. 463, 469-70 (1980) (recognizing the three distinct exceptions). Application of one does not mean the others cannot apply. Nor does application of one eviscerate the others. Seldom would the inevitable discovery exception save evidence in the outstanding warrant scenario because the facts typically will not demonstrate that the evidence "would have been obtained inevitably" notwithstanding the illegality. *Nix v. Williams*, 467 U.S. 431, 447 (1984).

The State concedes that the evidence in this case could not be saved under the inevitable discovery doctrine. The facts did not support it. But that fact does not eviscerate the inevitable discovery doctrine. The doctrine remains vibrant in situations like *Nix*, where an invalid confession led police to a body, but an organized search at the time would have led police to the body as well.

As discussed in the petition (at 19), the attenuation doctrine "'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its costs.'" *United States v. Leon*, 468 U.S. 897, 911 (1984) (quoting *Brown*, 422 U.S. at 609 (Powell, J., concurring in part)). Absent flagrant misconduct in the outstanding warrant scenario, the benefit of exclusion is

simply not worth the price paid. Pet. 18-21. Strieff offers no answer to that proposition. *See* Br. in Opp.

C. This case presents an ideal vehicle for addressing the attenuation question in outstanding warrant cases.

Strieff argues that this case is a poor vehicle for deciding whether the Utah Supreme Court's holding is correct because the police conduct below was flagrantly illegal. Br. in Opp. 21-22. That argument is wrong for two reasons: the police misconduct was not flagrant and, even if there were any doubt, it would in no way prevent the Court from addressing the issue presented.

As explained, the facts known to Detective Fackrell were just shy of reasonable suspicion. *See* Pet. 22-24. The stop was not random or arbitrary, but made after receiving a tip and conducting three hours of surveillance that corroborated that tip. Pet. 22. Based on these facts, the trial court concluded that the stop was a "good faith mistake . as to the quantum of evidence needed to justify an investigatory detention," the court of appeals agreed that it was a mere "misjudgment" by the officer, and the Utah Supreme Court never suggested otherwise. *See* Pet. App. 71, 102.

In all events, Strieff is missing the basic point. Under the Utah Supreme Court's reasoning, even the most reasonable of mistakes by a police officer would lead to exclusion of evidence lawfully seized

incident to a lawful arrest. Most courts around the nation disagree. This Court's resolution of that conflict is warranted. If the Court grants certiorari and adopts the majority rule, it will of course be free to apply that rule to the facts of this case (which we believe would lead to reversal) or remand to give the Utah Supreme Court the opportunity to do so.

CONCLUSION

For the reasons stated above and those in the petition, the Court should grant certiorari review.

Respectfully submitted,

SEAN D. REYES
Utah Attorney General
JEFFREY S. GRAY*
Assistant Attorney General
BRIDGET ROMANO
Utah Solicitor General
LAURA DUPAIX
Criminal Appeals Director
Counsel for Petitioner
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180
Email: jgray@utah.gov

**Counsel of Record*

Supreme Court, U.S.
FILED
JUN 18 2015
OFFICE OF THE CLERK

No. 14-1373

In the Supreme Court of the United States

STATE OF UTAH, PETITIONER,

v.

EDWARD JOSEPH STRIEFF, JR., RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND TEN OTHER STATES IN SUPPORT OF PETITIONER

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 241-8403

Kathryn M. Dalzell
Assistant Solicitor General

Attorneys for *Amicus Curiae*
State of Michigan

QUESTION PRESENTED

Whether evidence seized incident to a lawful arrest on an outstanding warrant should be suppressed because the warrant was discovered during an investigatory stop later held to be unlawful.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Interest of *Amici Curiae* 1

Argument 2

I. The circuits are split on the admissibility of evidence seized incident to a lawful arrest on an outstanding arrest warrant when the warrant is discovered during a stop later held to be unlawful. 2

A. The majority rule: Evidence comes in if the initial stop's illegality was not flagrant or if it was made in good faith 2

B. The minority rule: Evidence is suppressed, even if the initial stop was made in good faith 3

C. In between: Defendants in some states are subject to conflicting state and federal rules. 3

II. The minority rule, including the decision below, is inconsistent with this Court's exclusionary-rule jurisprudence. 4

A. This Court's attenuation jurisprudence focuses on (1) the police officer's control over the intervening circumstance and (2) the officer's good faith. 5

B. This Court's attenuation jurisprudence follows from its broader exclusionary-rule jurisprudence, including the well-

established exception for actions taken in good faith. 10

C. By overlooking an officer's good faith and lack of control over the intervening circumstance, the decision below conflicts with this Court's decisions 13

1. The minority rule is inconsistent with this Court's jurisprudence. 14

2. The concerns of the minority jurisdictions are unfounded. 14

3. Any supposed incremental value of the minority rule is outweighed by its great social costs. 18

Conclusion 21

Additional Counsel 22

TABLE OF AUTHORITIES

Cases

Arizona v. *Evans*,
514 U.S. 1 (1995) 1 14

Brown v. *Illinois*,
422 U.S. 590 (1975) ..... passim

Cox v. *State*,
916 A.2d 311 (Md. 2007) 17

Davis v. *United States*,
131 S. Ct. 2419 (2011) ..... passim

Hardy v. *Commonwealth*,
149 S.W.3d 433 (Ky. App. 2004) 4, 17

Heien v. *North Carolina*,
135 S. Ct. 530 (2014) 12

Herring v. *United States*,
555 U.S. 135 (2009) ..... passim

Hudson v. *Michigan*,
547 U.S. 586 (2006) 15, 16, 18, 19

Jacobs v. *State*,
128 P.3d 1085 (Okla. 2006) 17

McBath v. *State*,
108 P.3d 241 (Alaska Ct. App. 2005) 17

Michigan v. *Tucker*,
417 U.S. 433 (1974) 12

Missouri v. *Seibert*,
542 U.S. 600 (2004) 8

Oregon v. *Elstad*,
470 U.S. 298 (1985) 8

People v. *Brendlin*,
195 P.3d 1074 (Cal. 2008) 17

People v. *Mitchell*,
824 N.E.2d 642 (Ill. App. 2005) 15

People v. *Reese*,
761 N.W.2d 405 (Mich. App. 2008) 4, 17

Quinn v. *State*,
792 N.E.2d 597 (Ind. Ct. App. 2003) 17

Segura v. *United States*,
468 U.S. 796 (1984) 15, 16

State v. *Frierson*,
926 So. 2d 1139 (Fla. 2006) 17

State v. *Grayson*,
336 S.W.3d 138 (Mo. 2011) 15

State v. *Hill*,
725 So. 2d 1282 (La. 1998) 17

State v. *Hummons*,
253 P.3d 275 (Ariz. 2011) 17

State v. *Mazuca*,
375 S.W.3d 294 (Tex. Crim. App. 2012) 17

State v. *Moralez*,
300 P.3d 1090 (Kan. 2013) 18

State v. *Page*,
103 P.3d 454 (Ida. 2004) 17

State v. *Shaw*,
64 A.3d 499 (N.J. 2012) 15

State v. *Soto*,
179 P.3d 1239 (N.M. App. 2008) 15

State v. *Soto*,
214 P.3d 793 (N.M. 2009) 15

Stone v. *Powell*,
428 U.S. 465 (1976) 19

United States v. *Faulkner*,
636 F.3d 1009 (8th Cir. 2011) 17

United States v. *Green*,
111 F.3d 515 (7th Cir. 1997) 17

United States v. *Gross*,
662 F.3d 393 (6th Cir. 2011) 4, 17, 18

United States v. *Leon*,
468 U.S. 897 (1984) ..... passim

United States v. *Simpson*,
439 F.3d 490 (8th Cir. 2006) 17

Wong Sun v. *United States*,
371 U.S. 471 (1963) ..... passim

Rules

Rule 37.2(a) 1

INTEREST OF *AMICI CURIAE*[1]

In its decision below, the Utah Supreme Court excluded evidence seized in a search incident to a lawful arrest, made pursuant to a valid arrest warrant. At no point did the Utah courts question the good faith of the arresting officer. But because the officer discovered the outstanding arrest warrant during a stop that the courts later held lacked probable cause, the state's highest court held that the evidence must be suppressed. This decision contravenes this Court's exclusionary rule jurisprudence because it ignores the fact that the officer acted in good faith and had no control over the intervening circumstance (the existence of a valid arrest warrant). And the decision widens a pre-existing split among the federal circuit courts and state courts regarding the admissibility of such evidence in criminal trials.

As the chief law enforcement officers of their respective states, the State Attorneys General have a vital interest in ensuring that evidence obtained in good faith and pursuant to a valid arrest warrant is admissible. *Amici* states also have an important interest in the consistent application of federal law, including within their individual state borders. In Michigan, for example, identically situated defendants are subject to conflicting laws, depending on whether the trial occurs in state or federal court. Clarity is needed on this issue of great importance.

---

[1] Consistent with Rule 37.2(a), the amici States provided notice to the parties' attorneys more than ten days in advance of filing.

ARGUMENT

I. The circuits are split on the admissibility of evidence seized incident to a lawful arrest on an outstanding arrest warrant when the warrant is discovered during a stop later held to be unlawful.

As detailed more fully in the State of Utah's petition for certiorari, the circuits and highest state courts are split on the admissibility of evidence seized incident to a lawful arrest on an outstanding arrest warrant when the warrant is discovered during a stop later held to be unsupported by reasonable suspicion or probable cause. In its decision below, the Utah Supreme Court highlighted the "disarray in [the lower courts'] application of the attenuation doctrine to the outstanding warrant scenario," a "gap of substantial significance" in this Court's exclusionary-rule jurisprudence, and struggled openly to read the "tea leaves" in the absence of guidance from this Court. Pet. App. at 2, 35.

A. The majority rule: Evidence comes in if the initial stop's illegality was not flagrant or if it was made in good faith.

A majority of jurisdictions have held that evidence seized pursuant to a valid arrest warrant is admissible, even if the initial stop is later held to be unlawful, as long as the illegality of the initial stop was not flagrant. See Pet. at 8–12 (collecting cases). These jurisdictions have recognized that police lack control over the intervening circumstance in question (whether an outstanding warrant exists) and that the exclusionary rule's deterrent purpose is not

furthered by excluding such evidence in the absence of bad faith. Some jurisdictions have even held such evidence admissible regardless of the flagrancy of the initial stop. See *id.* at 15–17 (same).

B. The minority rule: Evidence is suppressed, even if the initial stop was made in good faith.

In contrast, a minority of jurisdictions, including the Utah Supreme Court below, have refused to admit such evidence. See Pet. at 12–15. While many of these jurisdictions purport to use the balancing test that this Court articulated in *Brown* v. *Illinois*, 422 U.S. 590 (1975), they give little to no weight to the discovery of a valid arrest warrant or to the good faith of the police officer, resulting in a functionally *per se* rule of suppression. The Utah Supreme Court adopted a slightly different approach—also resulting in suppression in the outstanding warrant scenario—holding that this Court's attenuation doctrine is limited to voluntary acts of a defendant's free will. Pet. App. at 3.

C. In between: Defendants in some states are subject to conflicting state and federal rules.

Of particular interest to *amici* States, conflicting rules sometimes apply within the same state, depending on whether the trial occurs in state or federal court. In Michigan, for example, the state Court of Appeals has held that "where the police only discover the defendant's identity as a result of the initial illegal stop or arrest, and the police misconduct was not particularly egregious or the result of bad faith, the discovery of a preexisting

arrest warrant will constitute an intervening circumstance that dissipates the taint of the initial illegal stop or arrest." *People* v. *Reese*, 761 N.W.2d 405, 413 (Mich. App. 2008). But in trials that occur in Michigan's federal courts, a conflicting rule will apply, because the Sixth Circuit has accorded an intervening warrant very little weight in the attenuation analysis. *United States* v. *Gross*, 662 F.3d 393, 404–06 (6th Cir. 2011).

The same is true in Kentucky, where the state Court of Appeals has adopted the majority rule, but the Sixth Circuit has applied the attenuation doctrine in a way that forecloses its application to the outstanding warrant scenario. Compare *Hardy* v. *Commonwealth*, 149 S.W.3d 433, 435–36 (Ky. App. 2004) with *Gross*, 662 F.3d at 404–06.

The federal and state courts need this Court's guidance on this issue.

II. The minority rule, including the decision below, is inconsistent with this Court's exclusionary-rule jurisprudence.

By discounting a police officer's good faith and inability to control the intervening circumstance (*i.e.*, whether an individual has an outstanding arrest warrant), the decision below contravenes both this Court's attenuation jurisprudence and its exclusionary-rule jurisprudence more generally.

A. This Court's attenuation jurisprudence focuses on (1) the police officer's control over the intervening circumstance and (2) the officer's good faith.

This Court's seminal cases on the attenuation exception to the exclusionary rule focus on (1) the police officer's ability to control the intervening circumstance; and (2) the officer's good faith. See *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Brown*, 422 U.S. 590.

In *Wong Sun* v. *United States*, this Court addressed the admissibility of statements by a defendant, James Wah Toy, after police illegally entered his apartment, chased him into his bedroom, and failed to provide any *Miranda*-style warnings (the case pre-dated *Miranda*). The government had argued that Toy's ensuing statements were intervening acts of Toy's free will that broke the chain of causation from the officers' initial illegal entry. But the Court rejected that argument, explaining that it was "unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion." 371 U.S. at 486. After all, "[s]ix or seven officers had broken the door and followed on Toy's heels into the bedroom where his wife and child were sleeping," and "[h]e had been almost immediately handcuffed and arrested." *Id.* The Court noted that "[i]t is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not." *Id.* at 486 n.12.

In contrast, the Court held that the confession of another defendant in that same case, Wong Sun, *was* admissible under the attenuation exception to the exclusionary rule. The Court first agreed with the lower courts that Sun's initial arrest had been made without probable cause or reasonable grounds. *Id.* at 491. But the Court held that the confession was admissible because the connection between his arrest and later confession "had become so attenuated as to dissipate the taint." *Id.* That is because Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make his statement. *Id.*

Twelve years later, the Court again addressed the attenuation exception in *Brown* v. *Illinois*, 422 U.S. 590 (1975). In *Brown*, police officers broke into Brown's apartment without a warrant or probable cause and searched it. *Id.* at 592. When Brown later returned home and "was climbing the last of the stairs leading to the rear entrance of his [] apartment," "he happened to glance at the window near the door. He saw, pointed at him through the window, a revolver held by a stranger who was inside the apartment." *Id.* The stranger said, "Don't move, you are under arrest," and another man with a gun came up behind him. *Id.* The strangers took him to the police station, questioning him along the way. *Id.* at 592–94. When they arrived at the station, they informed Brown of his *Miranda* rights. *Id.* at 594.

The state argued that Brown's subsequent statements were admissible because the intervening *Miranda* warnings broke the chain of causation and sufficiently dissipated the taint of the initial

unlawful entry and arrest. *Id.* at 597–600. But the Court rejected the state's argument, highlighting the possibility that the statement could have been "induced by the continuing effects of unconstitutional custody." *Id.* at 597. Indeed, the Court noted that the illegality "had a quality of purposefulness": "The imp[ro]priety of the arrest was obvious"; "awareness of that fact was virtually conceded by the two detectives"; and "[t]he manner in which Brown's arrest was [e]ffected gives the appearance of having been calculated to cause surprise, fright, and confusion." *Id.* at 605.

This Court made clear in *Brown* and *Wong Sun* that it was concerned with: (1) the police officer's ability to control the alleged intervening circumstances (i.e., the giving of *Miranda* warnings, and the degree to which police behavior induced the defendant's incriminating statements); and (2) the police officer's purpose (i.e., whether the officer acted in bad faith to exploit the illegality of the initial stop). The Court expressly rejected the idea that but-for causation is sufficient: "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Wong Sun*, 371 U.S. at 487–88. Instead, the focus is on whether the police exploited their own illegal conduct: "[T]he more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at *by exploitation of that illegality* or instead *by means sufficiently distinguishable* to be purged of the primary taint." *Id.* at 487–88 (emphasis added).

Thus, when the Court thought that the statements in *Wong Sun* and *Brown* were not truly voluntary and had instead been purposefully induced by the police, it suppressed them. *Wong Sun*, 371 U.S. at 486; *Brown*, 422 U.S. at 597, 605. Cf. *Missouri* v. *Seibert*, 542 U.S. 600, 612–14 (2004) (ordering suppression where police deliberately, in calculated strategy "to undermine the *Miranda* warnings" through coercion, delayed *Miranda* warnings until after unwarned interrogation had produced a confession). In contrast, when a defendant's statement had been truly voluntary, as it was for defendant Wong Sun, *Wong Sun*, 371 U.S. at 491, the Court was satisfied that the statement was not subject to the police officer's control and had not been caused by any bad faith by the officer. See also *Oregon* v. *Elstad*, 470 U.S. 298, 309, 313, 315–16 (1985) (suppression not required where pre-*Miranda* discussion "was not to interrogate the suspect," incident had "none of the earmarks of coercion," and officer's initial failure to warn was an "oversight" and not "calculated to undermine the suspect's ability to exercise his free will," making the causal connection between defendant's first and second responses to police "speculative and attenuated"); *Seibert*, 542 U.S. at 614 (distinguishing *Elstad* as involving "good-faith *Miranda* mistake" and "posing no threat to warn-first practice generally").

Justice Powell, in his *Brown* concurrence, clarified the relevance of control and good faith in the Court's attenuation cases. "[R]ecognizing that the deterrent value of the Fourth Amendment exclusionary rule is limited to certain kinds of police conduct," he suggested dividing cases into categories:

at one extreme, "the flagrantly abusive violation of Fourth Amendment rights," and at the other extreme, merely "technical Fourth Amendment violations." Where "official conduct was flagrantly abusive" he would require "the clearest indication of attenuation"—"some demonstrably effective break in the chain of events leading from the illegal arrest to the statement"—because "[i]n such cases the deterrent value of the exclusionary rule is most likely to be effective, and the corresponding mandate to preserve judicial integrity most clearly demands that the fruits of official misconduct be denied." *Id.* at 610–11 (Powell, J., concurring) (citations omitted). But as to technical violations, "where, for example, officers in good faith arrest an individual . . . , the deterrence rationale of the exclusionary rule does not obtain," and therefore there is "no legitimate justification for depriving the prosecution of reliable and probative evidence." *Id.* at 610–12 (Powell, J., concurring).

This Court similarly focused on the deterrence rationale in *United States* v. *Leon*, 468 U.S. 897 (1984). The *Leon* Court explained that "*Brown*'s focus on the causal connection between the illegality and the confession reflected the two policies behind the use of the exclusionary rule to effectuate the Fourth Amendment." *Id.* at 911 n.7 (internal quotations omitted). "Where there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts." *Id.* (internal quotations omitted).

The Court emphasized in its attenuation cases the importance of assessing the officer's control and good faith on a case-by-case basis: "[T]he *Miranda* warnings, alone and *per se*, cannot always make the act sufficiently a product of free will [to break] . . . the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited." *Brown*, 422 U.S. at 603. But while the Court rejected a *per se* rule that *Miranda* warnings always break the chain of causation, it also rejected "any alternative *per se* or 'but for' rule" that the chain is never broken. *Id.* "The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case." *Id.* Other circumstances the Court considered in these cases—which assessed the voluntariness of a defendant's statement in light of potential coercive police behavior—include the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Id.* at 603–04.

B. This Court's attenuation jurisprudence follows from its broader exclusionary-rule jurisprudence, including the well-established exception for actions taken in good faith.

By assessing the officer's ability to control the intervening circumstance and his or her good faith, the Court's reasoning in *Brown* and *Wong Sun* aligns perfectly with its exclusionary-rule jurisprudence more broadly—and in particular, with its well-established exception for errors made in good faith.

The sole purpose of the exclusionary rule is to deter misconduct by law enforcement. *Davis* v. *United States*, 131 S. Ct. 2419, 2426–27, 2432 (2011). Exclusion is not an individual right of criminal defendants. *Herring* v. *United States*, 555 U.S. 135, 141 (2009). This Court has thus repeatedly reminded courts to apply the exclusionary rule *only* when it will further its deterrence purpose. *E.g.*, *id.*; *Davis*, 131 S. Ct. at 2426–27; *United States* v. *Leon*, 468 U.S. 897, 907–08 (1984). And the deterrence benefits of suppression must outweigh its heavy costs—namely, the exclusion of relevant evidence of guilt and "letting guilty and possibly dangerous defendants go free—something that offends basic concepts of the criminal justice system." *Herring*, 555 U.S. at 141.

As this Court has recognized, "the deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue." *Davis*, 131 S. Ct. at 2427. "When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Id.* But "when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id.* at 2427–28 (internal citations and quotations omitted).

Thus, this Court has calibrated its cost-benefit analysis in exclusion cases to focus on the flagrancy of the police misconduct at issue. *Davis*, 131 S. Ct. at

2427; *Herring*, 555 U.S. at 137, 143. And because the deterrence benefits of targeting non-flagrant police behavior are so low, this Court has long applied a good-faith exception to the exclusionary rule. See, e.g., *Leon*, 468 U.S. at 907–08 ("Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system."); *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974) (noting that when a police officer acts in complete good faith, the deterrence rationale for suppression loses much of its force); *Herring*, 555 U.S. at 142 (detailing the development of the good-faith exception); *Davis*, 131 S. Ct. at 2428 (same). Thus, the good-faith exception both allows evidence to be admitted, and protects officers from civil liability via qualified immunity. *Heien* v. *North Carolina*, 135 S. Ct. 530, 539 (2014) (collecting cases).

Relatedly, this Court has routinely declined to apply the exclusionary rule when suppression would have no deterrent effect because the police officer lacks control over the relevant circumstances. As but one example, this Court declined to apply the exclusionary rule when police conduct a search in objectively reasonable reliance on a warrant later held invalid. *Leon*, 468 U.S. at 913, 922. The Court explained that "[t]he error in such a case rests with the issuing magistrate, not the police officer, and punishing the errors of judges is not the office of the exclusionary rule." *Davis*, 131 S. Ct. at 2428 (internal quotations and citations omitted) (discussing *Leon*). Cf. *Leon*, 468 U.S. at 912–13

(noting that "no Fourth Amendment decision marking a 'clear break with the past' has been applied retroactively"); *Arizona* v. *Evans*, 514 U.S. 1, 14 (1995), (applying good-faith exception where police reasonably rely on erroneous information concerning an arrest warrant in a database maintained by judicial employees).

The Court's attenuation decisions in *Brown* and *Wong Sun* thus flow logically from this Court's broader exclusionary-rule jurisprudence. The Court excluded evidence in *Brown* and *Wong Sun* when the police exercised control over the intervening circumstance and when they acted in bad faith. But when the officers proceeded in good faith or the intervening circumstance was beyond their control, the Court allowed the evidence.

C. By overlooking an officer's good faith and lack of control over the intervening circumstance, the decision below conflicts with this Court's decisions.

By discounting Detective Doug Fackrell's good faith and his lack of control over whether Strieff was subject to an outstanding arrest warrant, the Utah Supreme Court contravened this Court's jurisprudence. The Utah courts at no point doubted Detective Fackrell's good faith; indeed, the Court of Appeals agreed with the district court that the detective had acted in good faith, and the Supreme Court did not question that determination. See *State* v. *Strieff*, 286 P.3d 317, 329–31, rev'd, 2015 UT 2 (Utah App. 2012) ("There is no indication in the record that the officer stopped Strieff with the purpose of checking for outstanding warrants, and

the district court found that he did not target Strieff in knowing or obvious disregard of constitutional limitations."). Further, it is evident that Detective Fackrell had no control over whether there was a warrant out for Strieff's arrest. Suppression is unjustified under these circumstances.

1. The minority rule is inconsistent with this Court's jurisprudence.

The minority rule contravenes this Court's jurisprudence because it ignores both police control (or lack of it) over the intervening circumstance and good faith. In effect, these courts order suppression regardless of the culpability of the police conduct, and regardless of the officers' ability to control the intervening circumstance. Cf., e.g., *Brown*, 422 U.S. at 603–05; *Wong Sun*, 371 U.S. at 486–88; *Leon*, 468 U.S. at 907–08, 912–13, 922; *Davis*, 131 S. Ct. at 2427–28; *Herring*, 555 U.S. at 137, 143; *Evans*, 514 U.S. at 14. The minority rule also contravenes this Court's requirement of case-by-case assessment by imposing a *de facto* rule of suppression. Cf. *Brown*, 422 U.S. at 603–04; *Leon*, 468 U.S. at 918.

2. The concerns of the minority jurisdictions are unfounded.

Moreover, the concerns of the minority jurisdictions are unfounded, and analogous concerns have been rejected by this Court.

First, the majority rule does not encourage dragnet-style suspicionless stops. "[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act." *Hudson* v.

Michigan, 547 U.S. 586, 596 (2006). Here, the incentive is low.

As an initial matter, seizing an individual without probable cause or reasonable suspicion is illegal. This Court has stated that it is "unwilling to believe that officers will routinely and purposely violate the law as a matter of course." *Segura* v. *United States*, 468 U.S. 796, 812 (1984).

The majority rule itself also deters suspicionless stops by threatening exclusion for flagrantly illegal behavior. That is, if the officer's purpose for the initial stop is solely to check for outstanding arrest warrants and he has no other objective reason to support it, the evidence will be suppressed. See, e.g., *State* v. *Grayson*, 336 S.W.3d 138, 148 (Mo. 2011) (en banc) (ordering suppression where officer knew detainee, "knew that a lot of times there were warrants for him," and stop was nothing more than "fishing expedition"); *State* v. *Shaw*, 64 A.3d 499, 512 (N.J. 2012) (affirming suppression where stop was "random detention of an individual for the purpose of running a warrant check"); *People* v. *Mitchell*, 824 N.E.2d 642, 650 (Ill. App. 2005) (affirming suppression where "the sole apparent purpose of the detention [wa]s to check for a warrant"); *State* v. *Soto*, 179 P.3d 1239, 1245 (N.M. App. 2008) (affirming suppression where officers stopped defendant based on "vague notion that they would obtain [his] personal information"), *cert. quashed*, 214 P.3d 793 (N.M. 2009). Knowing this, police officers are not motivated to make illegal stops.

Even if the exception for flagrant illegality were not enough, police are also effectively deterred from

illegal behavior by the threat of civil liability, litigation costs, and attorney's fees. See *Hudson*, 547 U.S. at 596–98 ("[C]ivil liability is an effective deterrent here, as we have assumed it is in other contexts."); *Segura*, 468 U.S. at 812. Police are also subject to several strong institutional deterrents, including increasing professionalism of police forces and an emphasis on internal police discipline. *Hudson*, 547 U.S. at 598–99. Internal reprimands can limit or destroy successful careers. Municipalities also have an incentive to ensure proper conduct because "[f]ailure to teach and enforce constitutional requirements exposes municipalities to financial liability." *Id.*

Even setting aside the question of incentive levels for misconduct, this Court has been reluctant to indulge the specter of systemic misconduct without any evidence that a feared police tactic is actually occurring. In *Herring*, for example, this Court held unfounded "Petitioner's fears that our decision will cause police departments to deliberately keep their officers ignorant": "[T]here is no evidence that errors in Dale County's system are routine or widespread. . . . Because no such showings were made here, the Eleventh Circuit was correct to affirm the denial of the motion to suppress." 555 U.S. at 146–47. The Court explained that "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation." *Id.*; cf. *Hudson*, 547 U.S. at 604 (Kennedy, J., concurring) ("Today's decision does not address

any demonstrated pattern of knock-and-announce violations. If a widespread pattern of violations were shown, and particularly if those violations were committed against persons who lacked the means or voice to mount an effective protest, there would be reason for grave concern.").

Here, no evidence has been presented that police are routinely and systematically stopping people without reasonable suspicion or probable cause, solely to check for outstanding warrants. Indeed, the vast bulk of intervening-warrant attenuation cases do not suggest bad faith. See, e.g., *United States* v. *Faulkner*, 636 F.3d 1009, 1017 (8th Cir. 2011); *United States* v. *Gross*, 662 F.3d 393, 406 (6th Cir. 2011); *United States* v. *Simpson*, 439 F.3d 490, 496 (8th Cir. 2006); *United States* v. *Green*, 111 F.3d 515, 523 (7th Cir. 1997); *State* v. *Hummons*, 253 P.3d 275, 279 (Ariz. 2011); *People* v. *Brendlin*, 195 P.3d 1074, 1080 (Cal. 2008); *Cox* v. *State*, 916 A.2d 311, 323 (Md. 2007); *Jacobs* v. *State*, 128 P.3d 1085, 1089 (Okla. 2006); *State* v. *Frierson*, 926 So. 2d 1139, 1145 (Fla. 2006); *State* v. *Page*, 103 P.3d 454, 459 (Ida. 2004); *State* v. *Hill*, 725 So. 2d 1282, 1287 (La. 1998); *State* v. *Mazuca*, 375 S.W.3d 294, 309 (Tex. Crim. App. 2012); *People* v. *Reese*, 761 N.W.2d 405, 413 (Mich. App. 2008); *McBath* v. *State*, 108 P.3d 241, 250 (Alaska Ct. App. 2005); *Hardy*, 149 S.W.3d at 436; *Quinn* v. *State*, 792 N.E.2d 597, 602 (Ind. Ct. App. 2003).

Second, any fears of "recurring or systemic negligence" would be misplaced here. *Davis*, 131 S. Ct. at 2428–29 ("Unless the exclusionary rule is to become a strict-liability regime, it can have no

application in a case that does not involve any recurring or systemic negligence on the part of law enforcement and in which law enforcement officers did not violate a defendant's Fourth Amendment rights deliberately, recklessly, or with gross negligence." (internal quotations omitted)). Indeed, negligence is not what the minority jurisdictions are concerned about. Instead, they are concerned about police officers *intentionally* employing dragnet-style stops solely to conduct warrant checks. See, e.g., *Gross*, 662 F.3d at 404–05; *State* v. *Moralez*, 300 P.3d 1090, 1102 (Kan. 2013). As addressed above, that concern is negated through several different mechanisms, including the rule itself. The minority rule excluding evidence discovered pursuant to a valid arrest does not provide any incremental deterrence against police negligence.

3. Any supposed incremental value of the minority rule is outweighed by its great social costs.

The fact that the minority rule provides little, if any, incremental deterrence puts it at odds with this Court's precedent. "Quite apart" from issues of causation, "the exclusionary rule has never been applied *except* where its deterrence benefits outweigh its substantial social costs." *Hudson*, 547 U.S. at 594 (quotation omitted) (emphasis added). And this Court has held clearly that "marginal or nonexistent [deterrence] benefits" will not justify "the substantial costs of exclusion." *Herring*, 555 U.S. at 146 (quoting *Leon*, 468 U.S. at 909).

Suppression is denied where it "fails to yield appreciable deterrence" because it "exacts a heavy

toll on both the judicial system and society at large." *Davis*, 131 S. Ct. at 2426–27. That is, it requires courts to ignore reliable, trustworthy evidence bearing on guilt and potentially to set criminals loose in the community without punishment. *Id.* Exclusion is thus a "bitter pill" that society must swallow only as a "last resort" when the benefits of suppression outweigh its heavy costs. *Id.*; see also *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006).

"The rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." *Id.* "To vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention and surely its [e]xtension to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the criminal law." *Stone* v. *Powell*, 428 U.S. 465, 499-500 (1976) (Burger, C.J., concurring). See also *Leon*, 468 U.S. at 910; *Herring*, 555 U.S. at 141; *Hudson*, 547 U.S. at 591.

"Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." *Leon*, 468 U.S. at 907–08. In that instance, "[i]ndiscriminate application of the exclusionary rule . . . may well generate disrespect for the law and administration of justice." *Id.* Such is the case here.

* * *

In short, the minority rule that non-flagrant police behavior almost automatically triggers suppression when evidence was seized incident to a valid arrest warrant, but following a stop later held to be unlawful, "cannot be squared with the principles underlying the exclusionary rule, as they have been explained in [this Court's] cases." *Herring*, 555 U.S. at 147. "An error that arises from nonrecurring and attenuated negligence is [] far removed from the core concerns that led [this Court] to adopt the [exclusionary] rule in the first place." *Id.* at 144. At worst, Detective Fackrell's conduct involved "only simple, isolated negligence," *Davis*, 131 S. Ct. at 2427–28, and he lacked control over the existence of Strieff's outstanding arrest warrant. Because the Utah Supreme Court's decision conflicts with this Court's jurisprudence, and because the circuits and highest state courts are split on this issue, this Court should grant certiorari.

CONCLUSION

For the reasons stated above, this Court should grant the State of Utah's petition for a writ of *certiorari*.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Kathryn M. Dalzell
Assistant Solicitor General

Attorneys for *Amicus Curiae*
State of Michigan

Dated: JUNE 2015

ADDITIONAL COUNSEL

Douglas S. Chin
Attorney General
State of Hawaii
425 Queen St.
Honolulu, HI 96813

Gregory F. Zoeller
Attorney General
State of Indiana
302 W. Washington St.
IGC-South, Fifth Fl.
Indianapolis, IN 46204

Derek Schmidt
Attorney General
State of Kansas
120 S.W. 10th Ave.,
2nd Fl.
Topeka, KS 66612-
1597

Jack Conway
Attorney General
Commonwealth of
Kentucky
700 Capital Ave., Ste.
118
Frankfort, KY 40601

Douglas J. Peterson
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, NE 68509

Adam Paul Laxalt
Attorney General
State of Nevada
100 North Carson St.
Carson City, NV 89701

Wayne Stenehjem
Attorney General
State of North Dakota
600 E. Boulevard Ave.
Bismarck, ND 58505-
0040

Michael DeWine
Attorney General
State of Ohio
30 E. Broad St, 17th
Fl.
Columbus, OH 43215

Ellen F. Rosenblum
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301

Peter K. Michael
Attorney General
State of Wyoming
123 Capitol Building
Cheyenne, WY 82002

Supreme Court, U.S.
FILED
DEC - 8 2015
OFFICE OF THE CLERK

No. 14-1373

In the
Supreme Court of the United States

STATE OF UTAH,
Petitioner,

vs.

EDWARD JOSEPH STRIEFF, JR.,
Respondent.

On Writ of Certiorari
to the Utah Supreme Court

JOINT APPENDIX

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
LAURA B. DUPAIX
Deputy Solicitor General
THOMAS B. BRUNKER
Criminal Appeals Director
JEFFREY S. GRAY
Search & Seizure Sec. Dir.
350 N. State St., Ste. 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@utah.gov

Counsel for Petitioner

PATRICK L. ANDERSON
JOAN C. WATT*
Salt Lake Legal Defender Association
424 E. 500 S., Ste. 300
Salt Lake City, UT 84111
Tele: (801) 532-5444
Email: jwatt@sllda.com

STUART BANNER
UCLA Law School
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095

Counsel for Respondent

**Counsel of Record*

Petition for Writ of Certiorari Filed: May 15, 2015; Certiorari Granted: October 1, 2015

TABLE OF CONTENTS

Docket entries, Third District Court, Salt Lake County, State of Utah, Case No. 07190001 (State of Utah, Plaintiff, vs. Strieff, Edward Joseph Jr., Defendant) 1

Docket entries, Utah Court of Appeals, Case No. 20100541-CA 6

Docket entries, Utah Supreme Court, Case No. 20120854-SC 9

Transcript, Preliminary [Motion to Suppress] Hearing, May 1, 2009 12

The following opinions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the Appendix to the Petition for Writ of Certiorari

Opinion of the Utah Supreme Court ..... Pet. App. 1

Opinion of the Utah Court of Appeals..... Pet. App. 37

Trial Court's "Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion to Dismiss and Defendant's Motion to Reconsider" ..... Pet. App. 99

3RD DISTRICT COURT – SALT LAKE COUNTY
STATE OF UTAH

Case No. 071900011
STATE OF UTAH, PLAINTIFF
vs.
STRIEFF, EDWARD JOSEPH JR., DEFENDANT

RECORD INDEX

Date	Record Number	Proceedings
01/02/2007	1-3	Information
01/02/2007	4	Warrant of Arrest
06/12/2008	5	Not found in file – Case referred to Judge Christiansen for decision on 224.00 finders
06/17/2008	6	Not found in File-Finders Money in Trust (Court orders this case be on hold until resolution of the case)
10/16/2008	7-8	MINUTES INITIAL APPEARANCE NOTICE
10/16/2008	9-10	Affidavit of Indigency
10/23/2008	11	Appearance of Counsel – Marie Maxwell

10/23/2008	12-17	Formal request for discovery pursuant to rule 16 of the rules of criminal procedure
10/23/2008	18	Notice of bond hearing
10/28/2008	19-20	MINUTES – DRUG ROLL CALL NOTICE
11/18/2008	21-22	MINUTES – RESOLUTION HEARING
11/26/2008	23-24	Supervised Release Agreement
12/04/2008	25-26	MINUTES – INCOURT NOTE
01/09/2009	27	Substitution of Counsel – Robert K. Engar
01/30/2009	28-29	MINUTES – ARRAIGNMENT NOTICE
02/12/2009	30-35	Motion to Suppress – ROBERT K. ENGAR
03/27/2009	36-45	State's Memorandum Opposing Defendant's Motion to Suppress
04/03/2009	46	MINUTES – INCOURT NOTE NOTICE
05/01/2009	47	MINUTES – MOTION TO SUPPRESS NOTICE

05/26/2009	48-58	Defendant's Motion to Reconsider
05/26/2009	59	Not found in file - Sentencing Memorandum
06/19/2009	60	MINUTES – SCHEDULING CONFERENCE NOTICE
08/27/2009	61-63	State's Memorandum Opposing Defendant's Motion to Reconsider
08/28/2009	64	MINUTES – INCOURT NOTE NOTICE
09/25/2009	65	MINUTES – MOTION HEARING NOTICE
10/30/2009	66-72	Memorandum in support of Defendant's Motion to Reconsider
12/01/2009	73-90	State's Supplemental Memorandum opposing Defendant's Motion to Reconsider
12/04/2009	91	MINUTES – HEARING NOTICE
01/04/2010	92-96	Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion to Dismiss and Motion to Reconsider

02/12/2010	97	MINUTES – CHANGE OF PLEA NOTICE
02/12/2010	98-105	Statement of Defendant in support of guilty plea and certificate of counsel
02/12/2010	106	Referral to SLCO-PSR
02/22/2010	107	SLCO Criminal Justice Serves Stay Report (Will re-refer to AP&P for PSR)
02/23/2010	108	AP&P Referral
04/23/2010	109	MINUTES – CHANGE OF PLEA NOTICE
05/27/2010	110	SLCO – Presentence Report
06/04/2010	111-112	MINUTES – SENTENCE, JUDGMENT, COMMITMENT
06/04/2010	113	Probation Referral
07/01/2010	114-115	Notice of Appeal
07/01/2010	116-117	Designation of Record
07/01/2010	118-119	Certificate
07/08/2010	120-121	Utah Court of Appeals – Letter to Mr. Engar – Notice of Appeal has been filed, case number 20100541-CA should be reflected on any future filings

07/09/2010	122-124	Order to Release Property to Edward Joseph Strieff, Jr.
08/11/2010	125	Transcript, Preliminary Hearing, May 1, 2009; Carolyn Erickson, CSR
08/11/2010	126	Transcript, Motion Hearing, September 25, 2009; Carolyn Erickson, CSR
08/11/2010	127	Transcript, Ruling, December 4, 2009; Carolyn Erickson, CSR

* * *

UTAH COURT OF APPEALS

Case No. 20100541-CA

DOCKET ENTRIES

Date	Docket Number	Proceedings
07/07/2010	1	Notice of Appeal Filed
	* * *	
07/22/2010	4	Docketing Statement Filed
07/29/2010	5	Default Letter – Transcript
07/30/2010	6	Transcript Request Received
07/30/2010	7	Ack. of Request for Transcript
08/02/2010	8	Notice of Transcript Filed TC
08/10/2010	9	Called for Record
08/11/2010	10	Set Briefing Schedule
08/11/2010	11	Record Filed
08/13/2010	12	Appearance of Counsel
09/15/2010	13	Misc. Letter
09/15/2010	14	Stipulated Extension of Time for Appellant
10/21/2010	15	Motion for Extension of Time for Appellant

10/25/2010	16	Extension Granted
11/23/2010	17	Motion for Extension of Time for Appellant
11/24/2010	18	Extension Granted
12/23/2010	19	Appellant's Brief Filed
12/28/2010	20	Brief on Disc Filed
01/03/2011	21	Appearance of Counsel
01/03/2011	22	Misc. Letter
01/25/2011	23	Stipulated Extension of Time for Appellee
02/24/2011	24	Motion for Extension of Time for Appellee
02/28/2011	25	Extension Granted
03/28/2011	26	Motion for Extension of Time for Appellee
04/05/2011	27	Extension Granted
04/26/2011	28	4th Ext. Req. – Appellee Brief
05/17/2011	29	Extension Granted
05/27/2011	30	Appellee's Brief Filed
06/01/2011	31	Brief on Disc Filed
06/28/2011	32	Stipulated Extension of Time for Reply Brief
07/28/2011	33	Motion for Extension of Time for Reply Brief
08/16/2011	34	Extension Granted

08/29/2011	35	Appellant's Reply Brief Filed
08/30/2011	36	Brief on Disc filed
11/22/2011	37	Calendared
01/26/2012	38	Appellant's Supp Authority to Brf
01/31/2012	39	Submitted on oral argument
08/30/2012	40	Opinion Filed
09/24/2012	41	Notice – Extension for Writ of Cert filed
09/26/2012	42	Courtesy Copy
10/16/2012	43	Notice – Petition for Writ of Certiorari filed
01/14/2013	44	Notice – Cert Granted in SC
01/16/2013	45	Remittitur/Transfer
01/16/2013	46	Record Sent to Sup. Ct.

UTAH SUPREME COURT

Case No. 20120854-SC

DOCKET ENTRIES

Date	Docket Number	Proceedings
09/24/2012	1	Motion for Extension of Time for Writ of Cert
09/26/2012	2	Extension Granted
10/11/2012	3	Receipt for Payment
10/11/2012	4	Writ of Certiorari Filed
10/11/2012	5	Appearance of Counsel
11/13/2012	6	Response to Writ Filed
11/15/2012	7	Circulated
01/14/2013	8	Writ of Certiorari Granted
01/15/2013	9	Called for Record – Certiorari
01/16/2013	10	Transfer of Record from COA
01/16/2013	11	Record Filed
01/16/2013	12	Set Briefing Schedule
01/17/2013	13	Misc. Letter
02/28/2013	14	Appellant's Brief Filed
02/28/2013	15	Brief of Disc filed

04/02/2013	16	Motion for Extension of Time for Appellee
04/03/2013	17	Certificate of Service
04/04/2013	18	Extension Granted
04/16/2013	19	Stipulated Extension of Time for Appellee
04/16/2013	20	Misc. Letter
04/26/2013	21	Motion for Extension of Time for Appellee
04/29/2013	22	Extension Granted
04/29/2013	23	Appellee's Brief Filed
04/29/2013	24	Brief on Disc filed
05/03/2013	25	Misc. Letter
05/08/2013	26	Misc. Letter
05/29/2013	27	Stipulated Extension of Time for Reply Brief
06/03/2013	28	Calendared
06/28/2013	29	Appellant's Reply Brief Filed
06/28/2013	30	Brief on Disc filed
09/03/2013	31	Submitted on Oral Argument
09/05/2013	32	Appellee's Supp Authority to Brf
01/16/2015	33	Opinion Filed
01/28/2015	34	Motion to Stay Remittitur

01/30/2015	35	Remittitur Stayed
04/13/2015	36	Notice
05/19/2015	37	Courtesy Copy of US Cert Petition
05/22/2015	38	Notice – US Cert Petition Filed 5/15/15
10/06/2015	39	Notice – US Cert Granted 10/01/15

* * *

IN THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 071900011 FS
	:	
Plaintiff,	:	Appellate Court Case
	:	No. 20100541
vs.	:	
	:	
EDWARD JOSEPH	:	
STRIEFF, JR.,	:	
	:	
Defendant.	:	

PRELIMINARY HEARING MAY 1, 2009

BEFORE

JUDGE MICHELE CHRISTIANSEN

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

APPEARANCES

For the Plaintiff:	MATTHEW D. BATES Assistant District Attorney
For the Defendant:	ROBERT K. ENGAR Attorney at Law

* * *

INDEX

WITNESS	Page
DOUG FACKRELL	
Direct Examination by Mr. Bates	1
Cross Examination by Mr. Engar	8
Redirect Examination by Mr. Bates	11
CLOSING ARGUMENTS	
Mr. Engar	12, 15, 16
Mr. Bates	13, 16
RULING	17

SALT LAKE CITY, UTAH; MAY 1, 2010
JUDGE MICHELE CHRISTIANSEN
(Transcriber's note: speaker identification may not be accurate with audio recordings.)

PROCEEDINGS

MR. BATES: Your Honor, we're ready to go on the Strieff matter.

MR. ENGAR: Your Honor, Bob Engar for the defendant.

MR. BATES: Matthew Bates for the state.

MR. ENGAR: Elizabeth Lorenzo is assisting me also, Your Honor.

THE COURT: – to take evidence.

MR. BATES: Yes, Your Honor. We'll call Doug Fackrell to the stand.

DOUG FACKRELL

having been first duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. BATES:

Q Will you state your name for the record and spell your last name?

A Fackrell and it's F-A-C-K-R-E-L-L.

Q Mr. Fackrell, what was your occupation on December 21st of 2006?

[2] A Narcotics detective.

Q For what agency?

A For South Salt Lake Police.

Q How long had you been a narcotics detective on that date?

A Couple of years.

Q And how long as a police officer?

A On that date, 18 years.

Q Will you just describe briefly what kind of experience and training you've had in the detection and investigation of narcotic related offenses?

A Of course I've had basic training at the police academy, ongoing training as part of our department training. I've been to several specialized classes including Utah Narcotics Officers Association trainings and conference.

Q And what were your duties as a narcotics officer or as a narcotics detective?

A We basically focused on the street level of narcotics, so ...

Q Now on the 21st of December of 2006, you were watching a house at about 430 East and 2700 South?

A Yes.

Q Okay. Why were you watching that house?

A I'd received information on our drug tip line. An anonymous caller left a message on there saying that they **[3]** believed there was narcotics activity at the house and they described some short stay traffic at the house.

Q Did the caller state, give the address of the house or the description? How did you know this was the house the caller was referring to –

A They gave the address of the house and then I verified that by just driving by and making sure that that was the house that I was going to look at.

Q How long did you watch this house for?

A Off and on for a week or so.

Q Can you give an estimate as to maybe how many minutes or hours you spent sitting and watching the house, in total for that week?

A In total? Let's see, I would estimate maybe three hours.

Q Now, can you tell us when during the day generally you'd be watching the house?

A Most of the time in the evening, but I vary my shift, I would vary my shift sometimes in the mornings and sometimes in the evenings, so different times during the day.

Q Now did you notice the short term traffic that the anonymous caller had described?

A I did see short term traffic, yes.

Q Okay. How frequent was the short term traffic?

A Ummm, not terribly frequent but frequent enough that it raised my suspicion.

Q What was it about the frequency **[4]** that raised your suspicions? Was it more than you see at a regular house or less?

A It was more than I'd see at a regular house and it was just the duration of time that people would come, stay and then leave.

Q How long was that time on average?

A Just a couple of minutes.

Q Was that pretty consistent with everybody you saw visiting the house?

A Yes.

Q Now, on the 21st of December 2006 you stopped somebody leaving the house; is that correct?

A Yes.

Q Do you see that person in the courtroom?

A I do.

Q Will you point him out and describe what he's wearing?

A Yeah he's wearing a leather jacket, glasses, and a grey beard.

Q Why did you stop him?

A He was coming out of the house that I had been watching and I decided that I'd like to ask somebody if I could find out what was going on the house.

[5] Q How were you dressed when you spoke to him?

A Plain clothes.

Q Did you have a badge on? Was it readily identifiable that you were a police officer?

A Not right away, no, because I was driving an unmarked car, I was plain clothes but I was wearing a badge under my shirt and I was wearing this too, same thing.

Q Would you describe for the Court, just in brief, how the stop occurred; what you said to him; and what he said to youl; how you approached him?

A Sure. He came out of the house and he was walking eastbound on 27th and I approached him in the parking lot of the 7-Eleven on the corner of 27th and Adams which is about a block away from the house. I stopped him, told him who I was, told him that I had been watching the house and that I believed there might be drug activity there and asked him if he would tell me what he was doing there.

Q Okay. At some point did you request his identification?

A I did.

Q At what point during this conversation did you ask for his identification?

A You know, I don't know the exact point but it was, you know, of course it's normal for me to want to know who I'm talking to so I told him that, you know, if he had some **[6]** ID if I could please see it because I would like to know who I'm talking to, yes.

Q And when he produced this identification did you take it from him?

A Yes.

Q And what did you do with it?

A I had dispatch run a warrants check, normal warrants check.

Q And what did you find when you ran the warrants check[?]

A He had a warrant, small traffic warrant out of South Salt Lake Justice Court.

Q Did you arrest him on that warrant?

A I did.

Q What did you find when you arrested him?

A After arresting him I did the normal search on him – and can I refer to my notes so I can tell you exactly what it was –

Q Sure.

A – please. Okay, in his right front pocket –

MR. ENGAR: Your Honor if you could direct the witness to testify from memory and not just simply read his report?

MR BATES: I believe he's indicated that he can't remember exactly what he found and the report is a [7] contemporaneously written statement. I think it would be okay for him to refer to the report. He's not going to remember exactly where he found everything.

THE COURT: Do you need your report to refresh your recollection, sir?

THE WITNESS: It would help, yes.

THE COURT: – read from your report.

THE WITNESS: Okay. In his right front pocket there was a small green plastic scale and that scale I recognized as being commonly used in drug transactions to weigh small amounts of drugs. On the scale there was a white powder residue. In his left pant pocket I found a clear baggy with a white crystal substance inside. That substance field tested positive

for methamphetamine. In his coat pocket there was a black, a small black case. Inside that case there was a drug pipe and a small blue plastic baggy that also had a white crystal substance inside. That substance also tested positive for methamphetamine.

Q (BY MR. BATES) Now, did you see the defendant enter the house?

A I did not see him enter the house.

Q Okay. Had you seen the defendant at that house before when you'd been watching it? Had you seen him frequent that house?

A No.

[8] MR. BATES: Okay. That's all I have, your Honor.

CROSS EXAMINATION

BY MR. ENGAR:

Q: Officer, (inaudible) just asked you when you stopped Mr. Strieff at the 7-Eleven, was that the first time you had seen him?

A Yes.

Q So you have no idea how long he had been at the house?

A No.

Q And you have no idea if he lived at the house?

A No.

Q And you had no reason to stop him other than that he had left that house, correct?

A He was leaving the house the same as other people had done that I'd been watching.

Q Was there anything else that gave you suspicion that he was committing a crime other than him leaving the house?

A No.

Q Now this happened about, almost two and a half years ago, correct?

A Yes.

Q And you prepared a report shortly after this happened; is that also correct?

[9]A Yes.

Q And it's fair to say that this report is the basis for your recollection, is it not?

A Yes.

Q Your testimony about the anonymous caller saying there was short-stay traffic is not your report, is it?

A No.

Q Nor is it in your report that you'd been watching the house for a week?

A No.

Q Nor is it in your report that you'd been watching the house for three hours, correct?

A No.

Q Yet almost two and a half years later you're remembering these things?

A Yes.

Q You said you'd been 18 years on the police force before this happened; is that correct?

A Yes.

Q How many arrests did you make during those 18 years?

A I have no idea.

Q Hundreds?

A Probably.

Q Thousands maybe?

[10] A Uh-huh (affirmative).

Q How many years were you a police officer after this arrest?

A For two more years.

Q When you stopped Mr. Strieff you were in an unmarked vehicle?

A Yes.

Q How did you stop him?

A I just pulled up next to him and then got out of the truck and approached him.

Q Were the lights activated on the truck?

A No.

Q But you identified yourself as a police officer?

A Yes.

MR. ENGAR: If I could just have a moment, Your Honor.

Q (BY MR. ENGAR) You said that the short-stay traffic at the house you observed was not frequent; isn't that correct?

A I don't believe that's what I said.

Q What did you observe about the short-stay traffic at the house?

A People would come stay only for a couple of minutes and then leave.

Q How many people?

[11] A In that week, I'm not sure. I didn't make any notes.

Q When you asked Mr. Strieff what he was doing at the house what did he tell you?

A I don't recall what he told me.

MR. ENGAR: I don't any more questions, Your Honor.

MR. BATES: A couple of followup, Your Honor.

REDIRECT EXAMINATION

BY MR. BATES:

Q Do you recall what kind of identification the defendant gave you?

A Utah identification card.

Q Did that probably have an address on it?

A I don't know for sure. It does but I don't know what the address is.

MR. BATES: That's all.

MR. ENGAR: I don't have any further questions, Your Honor.

THE COURT: Thank you, Detective Fackrell. Is that all the evidence you have?

MR. BATES: That's all the evidence I have.

MR. ENGAR: Defense doesn't have any evidence to present, Your Honor.

THE COURT: I note in your brief, Mr. Bates, that you wanted the opportunity to brief the issue of

reasonable [12] suspicion or do you want to just make–

MR. BATES: In my brief I did mention that I'd like to reserve that opportunity. After hearing the testimony, I think I'm ready to concede that this doesn't quite meet the level of reasonable suspicion under Terry v. Ohio. I think it's extremely close but I don't think further briefing is going to really get us anywhere. So it seems to me the issue at this point is going to rest on attenuation.

THE COURT: I would agree.

MR. ENGAR: Well, Your Honor, I would first argue first of all under Utah Code 77-7-15 that an officer may stop any person when he has reasonable suspicion to believe the person has committed an offense and may demand his name, address, and explanation of his activities. There's no reasonable suspicion, there's no reason to stop Mr. Strieff and ask his name and if you can't get his name you can't get the warrant and, you know, I don't think attenuation is the issue. I think it's simply reasonable suspicion to make a stop and I think Mr. Bates just said that there wasn't, it didn't rise to that level and if there's no reasonable suspicion, he can't stop Mr. Strieff.

I think it's clear he was stopped. The officer stopped him, asked him some questions, took his ID and did a warrants check. So I think it's clearly a stop that would require reasonable suspicion. It didn't exist here and in [13] fact, Your Honor, the

court said, leaving a house suspected of drug activity which is a case I referenced in my motion in Sykes, that's not enough. The Court said any connection between the defendant and the illegal activity was purely speculation and that's what it would be here also. There's no evidence that there had been any other stops of people with drugs coming from this house, only an anonymous caller which that's presumptive unreliable, Your Honor, the person doesn't even give their name. There's just not anything here. I don't even think attenuation is an issue.

THE COURT: Well, it's not necessarily that it's attenuation but it's the – I think as you articulated, Mr. Bates, it's the 'but for' test.

MR. BATES: That's correct, Your Honor. The U.S. Supreme Court in Won Sung said that they were not articulating a 'but for' test and pretty much every court, to look at this issue since Won Sung, including the Supreme Court in Brown and the numerous Federal and State Courts have rejected the idea that it's simply a 'but for' test. If it were a 'but for' test, obviously we'd have a problem here, but it's not.

I think to quote the Supreme Court of Washington back in '68, even long before Won Sung or about the same time as Won Sung, I think, it's indescribably silly to say that you can't arrest somebody on a valid warrant that you **[14]** discover during a stop just because the initial stop was unlawful. Once we discover the warrant, the officer really almost has no

choice but to follow the judge's order in that warrant, arrest the person and what the courts have held is that's a valid arrest and that the suppression is not an appropriate remedy where we're done a search incident to arrest during a valid arrest and this is a doctrine that though relatively new within the last 10 years has gained wide acceptance throughout, almost every jurisdiction in the country that's confronted the issue.

The only real question in this case is was it a flagrant violation and what the courts have held in, I think U.S. v. Green is sort of a leading case. It's a Seventh Circuit case that everybody looks to, is that as long as it's not a flagrant violation of the Fourth Amendment that a warrant attenuates the search incident to arrest from the illegal stop and this does not seem like the kind of case where it's a flagrant violation. Detective Fackrell stopped this individual under a good faith belief that he had reasonable suspicion to stop him. He'd been watching the house. He'd been corroborating the anonymous tips and he made what I think is probably an innocent or mistake in calculation of the quantum of suspicion needed to stop the defendant.

It's not the type of case – and if you look at the [15] case law on flagrancy of these violations, usually what they're looking at are things like these dragnet searches where, for example, cops go through Pioneer Park and round up everybody there and just search them and check their ID. This isn't that kind

of stop. It's something where the officer thought he was doing the right thing in complying with the law and just, you know, made the mistake and wasn't actually complying. So I don't believe it's flagrant and it shouldn't be, the evidence shouldn't be suppressed in this case.

MR. ENGAR: Your Honor, you still have to look whether the evidence was obtained through an exploitation of an illegality and it clearly was. There wasn't reasonable suspicion to stop Mr. Strieff. He didn't volunteer his name and ID, he didn't give that voluntarily. He gave it because he was stopped by an officer who said I want to know your name. Show me some identification. Without that, Officer Fackrell doesn't even know who this is and if he doesn't know who this guy is, he doesn't get to run a warrants check. If he doesn't get to run a warrants check, he doesn't make an arrest. I don't see how the State can argue that, Well, yeah, he stopped him for a bad reason and the officer's good faith is irrelevant, Your Honor, it's whether he has reasonable suspicion and in this case, again, he just didn't. What he observed falls far short of the other cases [16] referenced in my memo and even in the State's memo that references the Fredrickson case where they'd been watching the house for a year; they'd made arrests. In this case we don't have that and without that, even though the State's officer was able to discover a warrant, that doesn't remedy the fact that the reason

they discovered this warrant is a few seconds ago they illegally got his name and his ID.

MR. BATES: May I respond, Your Honor –

THE COURT: Sure.

MR. BATES: – briefly. I think counsel is still arguing a 'but for' causation. We didn't know he had a warrant and had he not had a warrant, he would have been questioned and allowed to go. The warrant is what caused the search and the subsequent finding of the drugs, not the stop, not the ID or any of that. That's all 'but for'. It's the discovery of the warrant and that's why these courts around the country have been so unanimous in holding that the discovery of the warrant is a very strong reason to attenuate a search from a stop.

THE COURT: Did you want to respond to that?

MR. ENGAR: The search was still directly related to the stop, Your Honor. I mean, the – I don't think just because he found a reason to search him that it was valid, justifies the fact that he was stopped and questioned. I mean, I would move to suppress him making the statement of [17] his name and if there's no statement of his name, the State can't present evidence that they found a warrant. I mean, the fact that they were so close together, I think it is flagrant that the officer's infringing on this man's rights to be free from unreasonable searches and seizures when the officer stops him and says, Give me your name, without a reason. He can't do that. He can say hi and talk to him on the street

but to stop him and demand his name and identification and hold onto that, is not justified.

THE COURT: I understand, Mr. Engar, from your point of view, it is an unreasonable stop, it's an unreasonable search, if you will, given the information that Detective Fackrell had at the time he stopped Mr. Strieff but Mr. Bates' argument is supported in the case law and it's also reasonable in and of itself. There's that quote from the Green case that says, "It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to wanted on a warrant, in a sense requiring and official call of ally, ally ox in free." That's exactly what we have in this case and that is while the information that Detective Fackrell had, as conceded by the State, didn't necessarily rise to a reasonable suspicion that Mr. Strieff was engaging in illegal behavior. The fact of the matter is, he had an outstanding warrant when Detective Fackrell stopped him that evening or [18] that day, I'm not sure – that evening and to suppress the information that was legally obtained pursuit to the arrest of Mr. Strieff I think flies in the face of our jurist prudence and I do believe that the warrant, the discovery of the warrant intervened to dissipate the taint of the illegal stop and I'm going to deny the Motion to Suppress.

I don't know if you want to set this for a scheduling conference, if you want to set this for – what do you want to set this for?

MR. BATES: Scheduling conference would be fine, Your Honor. The State can prepare findings and conclusions.

THE COURT: We'll order that the State do that and do you want to come – I'll give you the option of June 5, June 12 and June 19.

MR. ENGAR: Let's just it on the 19th, Your Honor.

THE COURT: Let's do. We'll set this for a scheduling conference on June 19.

(Whereupon the hearing was concluded)

CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned proceeding held Judge Michele Christiansen was transcribed by me from an audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed August 2nd, 2010 in Sandy, Utah.

/s/

Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

Supreme Court, U
FILED
DEC - 4 201
OFFICE OF THE CLE

No. 14-1373

In the
Supreme Court of the United States

STATE OF UTAH,
Petitioner,

vs.

EDWARD JOSEPH STRIEFF, JR.,
Respondent.

On Writ of Certiorari
to the Utah Supreme Court

BRIEF FOR PETITIONER

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
LAURA B. DUPAIX
Deputy Solicitor General
THOMAS B. BRUNKER
Criminal Appeals Director
JEFFREY S. GRAY
Search & Seizure Section
Director
Counsel for Petitioner
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@utah.gov

**Counsel of Record*

QUESTION PRESENTED

Should evidence seized incident to a lawful arrest on an outstanding warrant be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 10

I. THE EVIDENCE LAWFULLY SEIZED INCIDENT TO STRIEFF'S WARRANT-ARREST IS ADMISSIBLE UNDER THE ATTENUATION EXCEPTION TO THE EXCLUSIONARY RULE. 10

A. Because the exclusionary rule exists only to compel respect for constitutional rights, it applies only when it appreciably deters future police misconduct. 10

B. Under the attenuation exception, evidence is admissible when its discovery is so attenuated from the prior illegality that suppression would not appreciably deter future police misconduct. 14

C. Absent a flagrantly unlawful stop, suppressing evidence lawfully seized incident to an intervening warrant-arrest will not appreciably deter future police misconduct. 21

D. Because Detective Fackrell's investigatory stop was not flagrantly unlawful, suppressing the evidence lawfully seized incident to Strieff's arrest will not appreciably deter future misconduct. 29

II. THE UTAH SUPREME COURT ERRONEOUSLY HELD THAT THE ATTENUATION EXCEPTION NEVER APPLIES TO THE PRE-EXISTING WARRANT SCENARIO. 32

A. The attenuation exception is well suited to promoting the exclusionary rule's deterrence purpose in the pre-existing warrant scenario 33

B. The attenuation exception is not based on the tort theory of proximate causation, but on the deterrent value of suppression. 36

C. Exceptions to the exclusionary rule are not mutually exclusive; suppression is not warranted if any one of them applies. 37

CONCLUSION 41

TABLE OF AUTHORITIES

FEDERAL CASES

Ashcroft v. al-Kidd,
131 S.Ct. 2074 (2011) 24, 32

Atkins v. City of Chicago,
631 F.3d 823 (7th Cir. 2011) 27

Brown v. Illinois,
422 U.S. 590 (1975) ..... *passim*

Davis v. United States,
131 S.Ct. 2419 (2011) ..... *passim*

Dunaway v. New York,
442 U.S. 200 (1979) 23, 34

Elkins v. United States,
364 U.S. 206 (1960) 12, 22

Herring v. United States,
555 U.S. 135 (2009) ..... *passim*

Horton v. California,
496 U.S. 128 (1990) 26

Hudson v. Michigan,
547 U.S. 586 (2006) 11

Johnson v. Louisiana,
406 U.S. 356 (1972) 18, 28, 34

Kaupp v. Texas,
538 U.S. 626 (2003) 33

Nardone v. United States,
308 U.S. 338 (1939) 10

Navarette v. California,
134 S.Ct. 1683 (2014) 31

New York v. Harris,
495 U.S. 14 (1990) 21, 23

Nix v. Williams,
467 U.S. 431 (1984) 11, 12, 39

Segura v. United States,
468 U.S. 796 (1984) 10

Stone v. Powell,
428 U.S. 465 (1976) 12

Taylor v. Alabama,
457 U.S. 687 (1982) 33

Terry v. Ohio,
392 U.S. 1 (1968) ..... *passim*

United States v. Arvizu,
534 U.S. 266 (2002) 29

United States v. Calandra,
414 U.S. 338 (1974) 11

United States v. Ceccolini,
435 U.S. 268 (1978) ..... *passim*

United States v. Crews,
445 U.S. 463 (1980) 14, 38

United States v. Green,
111 F.3d 515 (7th Cir. 1997) 22, 28

United States v. Janis,
428 U.S. 433 (1976) 12, 23

United States v. Leon,
468 U.S. 897 (1984) ..... *passim*

United States v. Robinson,
414 U.S. 218 (1973) 21

United States v. Scott,
270 F.3d 30 (1st Cir. 2001) 39

Wong Sun v. United States,
371 U.S. 471 (1963) ..... *passim*

Wyoming v. Houghton,
526 U.S. 295 (1999) 31

STATE CASES

People v. Brendlin,
195 P.3d 1074 (Cal. 2008) 22, 25, 28

People v. Defore,
150 N.E. 585 (N.Y. 1926) 13

State v. Alverez,
2006 UT 61, 147 P.3d 425 30

State v. Frierson,
926 So.2d 1139 (Fla. 2006) 25

State v. Strieff,
2015 UT 2, 357 P.3d 532
(Pet. App. 1-36) ..... *passim*

State v. Strieff,
2012 UT App 245, 286 P.3d 317
(Pet. App. 37-98) ..... *passim*

Torres v. State,
341 P.3d 652 (Nev. 2015) 6

FEDERAL CONSTITUTIONAL PROVISIONS & STATUTES

28 U.S.C. § 1257 (2012) 1

U.S. CONST. amend. IV 1

STATE RULES

Utah R. Crim. P 11 4

OPINIONS BELOW

The Utah Supreme Court's opinion is reported at 2015 UT 2, 357 P.3d 532 (Pet. App. 1-36). That court reversed a Utah Court of Appeals decision reported at 2012 UT App 245, 286 P.3d 317 (Pet. App. 37-98). The intermediate court had affirmed the unreported order of the Utah Third District Court denying Strieff's motion to suppress (Pet. App. 99-103).

JURISDICTION

The Utah Supreme Court entered its judgment on January 16, 2015. On April 6, 2015, this Court extended the deadline to file a petition for a writ of certiorari to May 18, 2015 (14A1025). The State filed its petition on May 15, 2015, and this Court granted certiorari on October 1, 2015. This Court has jurisdiction under 28 U.S.C. § 1257(a) (2012).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. *Factual background.* Sometime before the investigatory stop at issue here, a judge issued an ar-

rest warrant for respondent Edward Strieff on a traffic matter. Pet. App. 5; J.A. 18-19. Strieff has never questioned the warrant's validity.

* * *

In December 2006, an anonymous caller left a message on a police drug-tip line reporting "narcotics activity" at a house in the City of South Salt Lake, Utah. Pet. App. 4. To corroborate the tip, narcotics detective Doug Fackrell—an 18-year law-enforcement veteran with specialized training in drug enforcement—intermittently watched the house for a total of about three hours over the course of a week. Pet. App. 4; J.A. 14-15. He saw some "short term traffic" at the house—visitors would arrive, enter, and leave within a few minutes. Pet. App. 4. In Detective Fackrell's experience, the short-term visits—though not "terribly frequent"—were more than those at a typical house and were consistent with drug-sale activity. *Id.*

While watching the house on December 21, 2006, Detective Fackrell saw Strieff leave the house, "the same as other people had done that [he'd] been watching." J.A. 21; Pet. App. 4. He had not seen Strieff enter the house. Pet. App. 4. After Strieff walked roughly a block, Detective Fackrell stopped him in a 7-Eleven parking lot. *Id.* at 4, 38.

Detective Fackrell identified himself, explained why he had been watching the house, and asked Strieff what he had been doing there. *Id.* at 4-5. De-

tective Fackrell also asked Strieff for identification and asked dispatch to run a warrants check. *Id.* at 5; J.A. 18. In response, dispatch told Detective Fackrell of the pre-existing arrest warrant. Pet. App. 5. Detective Fackrell—who had not previously known of the warrant—then arrested Strieff and, in a search incident to that arrest, found in Strieff's possession methamphetamine, a glass drug pipe, and a small plastic scale with white residue. *Id.* at 5, 101.

2. *Trial court proceedings.* The State charged Strieff with unlawfully possessing methamphetamine and drug paraphernalia. Pet. App. 5. Strieff moved to suppress the evidence seized in the search incident to his arrest, arguing that it was fruit of an unlawful investigatory stop. Pet. App. 5. Strieff did not argue that the warrant-arrest or the search incident to it were unlawful.

The prosecutor conceded that although the question was "extremely close," the facts available to Detective Fackrell at the time of the initial stop did not "quite meet the level of reasonable suspicion under" *Terry v. Ohio*, 392 U.S. 1 (1968). J.A. 24. Though courts would usually apply the exclusionary rule to suppress evidence seized in such stops, the prosecutor argued that—under the attenuation exception—the court should admit the evidence because the lawful arrest on a valid warrant was an intervening circumstance that purged the taint of any illegality in the initial investigatory stop. Pet. App. 5.

The state trial court agreed. It concluded that Detective Fackrell's initial stop "was not a flagrant violation of the Fourth Amendment." *Id.* at 102. And Detective Fackrell "did not exploit the initial unlawful detention to search" Strieff because "the search was conducted after discovering an outstanding warrant and arresting [Strieff] on that warrant, an intervening circumstance that [Detective] Fackrell did not cause and could not have anticipated." *Id.* at 102-03. Accordingly, the court denied the motion to suppress and a subsequent motion to reconsider. *Id.* at 6, 99-103; J.A. 29.

Strieff pleaded guilty to possession of drug paraphernalia and an amended charge of attempted possession of a controlled substance, reserving the right to appeal the order denying his motions to suppress and to reconsider. Pet. App. 6.[1]

3. *Utah Court of Appeals.* The Utah Court of Appeals affirmed in a 2-1 opinion. It agreed that the stop was not "in knowing or obvious disregard of constitutional limitations." *Id.* at 70. It found that the trial court's conclusion that Detective Fackrell's "conduct was neither purposeful nor flagrant" was

---

[1] Utah law allows a defendant to enter a conditional guilty plea that reserves the right to appeal "the adverse determination of any specified pre-trial motion." Utah R. Crim. P. 11(j). If the defendant prevails on appeal, he may withdraw his guilty plea. *Id.*

"supported by the circumstances of the encounter as a whole." *Id.* at 71. It further agreed with the trial court that Detective Fackrell "'did not cause and could not have anticipated' discovery of the arrest warrant." *Id.* at 70. It concluded that Detective Fackrell's "misconduct amounted to a misjudgment, one of constitutional proportion certainly, but a single misstep over the constitutional boundary rather than a deliberate transgression." *Id.* at 71.

Accordingly, the court of appeals held that the arrest on "the preexisting warrant was an intervening circumstance that, coupled with the absence of purposefulness and flagrancy on the part of [Detective] Fackrell in detaining Strieff, sufficiently attenuated" the taint of the unlawful stop. *Id.* at 83-84.

4. *Utah Supreme Court.* The Utah Supreme Court granted certiorari and reversed. It acknowledged that Strieff was lawfully arrested on the outstanding warrant and lawfully searched incident to that arrest. *Id.* at 32. It nonetheless held that the lawfully seized evidence should be excluded because Detective Fackrell first learned of the warrant during an unlawful investigatory stop. *Id.* at 34. Breaking from what it admitted is the majority view—that a warrant-arrest is an intervening event that tends to attenuate the taint of prior unlawful conduct—the Utah court adopted a novel position: the attenuation exception does not apply *at all* when the intervening event is a warrant-arrest. *Id.* at 2-4, 27, 31. The

court based that conclusion on its view that the attenuation exception applies only to "intervening circumstances involving a defendant's independent acts of free will (such as a confession and perhaps a consent to search)." *Id.* at 25-27, 31.[2] The Utah Supreme Court believed that to the extent any exception to the exclusionary rule applies to the pre-existing warrant scenario, the inevitable discovery exception was a better fit. The court further reasoned that only one of those two exceptions can apply to any set of facts. *Id.* at 27, 31-34.

SUMMARY OF ARGUMENT

The exclusionary rule embodies no free-standing constitutional right. It is only a mechanism this Court created to deter police from violating constitutional rights. In the Fourth Amendment context, it deters future unlawful searches and seizures.

Suppressing the evidence seized from Strieff would not yield appreciable deterrence. Detective Fackrell's initial unlawful stop arose from an objectively reasonable misjudgment, not an obvious or reckless violation of Strieff's Fourth Amendment rights. And Detective Fackrell found the evidence in Strieff's possession in a search incident to an arrest

---

[2] The Nevada Supreme Court has since reached the same conclusion. *See Torres v. State*, 341 P.3d 652, 658 (Nev. 2015), *Pet. for Cert. filed*, ___ U.S.L.W. ___ (U.S. June 26, 2015) (No. 15-5).

on a valid pre-existing warrant. That intervening warrant-arrest sufficiently attenuated the lawfully seized evidence from the unlawful stop such that suppression would not appreciably deter future misconduct.

1. The exclusionary rule's sole purpose is to deter future constitutional violations. Suppressing evidence under the rule imposes a high cost; excluding relevant, often crucial, evidence exacts a heavy toll on the truth-finding process because it may result in a criminal returning to society unpunished and free to commit further crimes. Given that high cost, the Court suppresses evidence only as a last resort, not as a first impulse. It limits the rule's application to circumstances when the potential to deter future police misconduct is sufficiently appreciable to justify suppression's high cost.

To that end, the Court has adopted exceptions to the rule, including the attenuation exception at issue here. Under the attenuation exception, intervening events between the initial illegality and the discovery of evidence may sufficiently remove the initial taint so as to make the evidence admissible. The attenuation analysis is a case- and evidence-specific one; this Court has never prescribed a rigid checklist of factors that courts must consider in *every* attenuation case. Rather, the core attenuation inquiry always remains the same: whether, because of the passage of time or other intervening circumstances,

suppression will so appreciably deter future Fourth Amendment violations that it justifies exclusion's high cost. Under this Court's precedents, that inquiry focuses on two critical components: the nature of the intervening event and the flagrancy of the initial violation.

This case involves a non-flagrant, unlawful stop of a suspect subject to an arrest warrant. Properly applied to those circumstances, the attenuation exception makes admissible evidence legally seized in a search incident to a warrant-arrest. Excluding such evidence would exact too high a cost for the marginal potential to deter future unconstitutional stops.

First, the significance of this particular intervening event—the warrant-arrest—makes suppression a poor deterrent. The warrant-arrest all but broke any connection between the prior unlawful stop and the evidence's discovery. Police have a legal duty to arrest a person subject to a warrant, and the Fourth Amendment permits searches incident to arrest. In light of the outstanding warrant, the evidence was lawfully seized in a lawful search incident to a lawful arrest. Suppressing evidence that by definition was lawfully seized serves no appreciable deterrence purpose.

Second, Detective Fackrell's stop here was not flagrantly unlawful. As the Utah intermediate appellate court recognized, Detective Fackrell's investigatory stop "amounted to a misjudgment" in applying

the law to the facts. Pet. App. 71. It was "a single misstep over the constitutional boundary." *Id.* The Utah Supreme Court did not disagree. When the detective's single misstep led to the discovery of an arrest warrant, he was duty bound to arrest Strieff, which in turn was the reason for the search.

Excluding evidence found during a lawful search incident to a lawful arrest in order to deter future unlawful stops is not the sort of appreciable deterrence that justifies exclusion's high cost.

2. The Utah Supreme Court reached a contrary, erroneous conclusion because it disregarded the exclusionary rule's controlling inquiry: whether excluding the evidence would appreciably deter future unlawful investigatory stops. Instead, it looked to what it believed to be the controlling features of the attenuation exception itself—factors this Court has considered to assess attenuation in certain circumstances. It held, based on those factors, that the attenuation exception applies only when the intervening event is an independent act of the defendant's free will.

To be sure, an independent act of a defendant's free will can attenuate the link between the unlawful conduct and the later discovery of evidence. But so can an arrest on a warrant previously issued by an independent judicial officer. In fact, the latter creates a significantly lower risk that police will exploit the initial unlawful conduct to seize evidence.

The Utah Supreme Court therefore improperly applied the exclusionary rule outside of the reason for the rule's existence, and it did so as a first impulse, not as a last resort.

ARGUMENT

I. THE EVIDENCE LAWFULLY SEIZED INCIDENT TO STRIEFF'S WARRANT-ARREST IS ADMISSIBLE UNDER THE ATTENUATION EXCEPTION TO THE EXCLUSIONARY RULE.

Suppressing evidence seized incident to a lawful warrant-arrest during a non-flagrant, unlawful stop will not appreciably deter future police misconduct.

A. Because the exclusionary rule exists only to compel respect for constitutional rights, it applies only when it appreciably deters future police misconduct.

The exclusionary rule forbids using at trial "evidence obtained as a direct result of an illegal search or seizure," as well as "evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" *Segura v. United States*, 468 U.S. 796, 804 (1984) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)). The rule is a remedy "created by this Court to 'compel respect for the constitutional guaranty,'" and "'not a personal constitutional right.'" *Davis v. United States*, 131 S.Ct. 2419, 2426 (2011) (citations omitted).

That is why this Court long ago rejected the idea that the "identification of a Fourth Amendment violation" is "synonymous with application of the exclusionary rule to evidence secured incident to that violation." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). Not every Fourth Amendment violation merits suppression because excluding evidence "exacts a heavy toll on both the judicial system and society at large." *Davis*, 131 S.Ct. at 2427. The Court thus limits the exclusionary rule to circumstances when it "most efficaciously serve[s]" its remedial objective. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

That remedial objective is straightforward—the exclusionary rule's "sole purpose . is to deter future Fourth Amendment violations." *Davis*, 131 S.Ct. at 2426. And this Court's cases identify limiting principles by which it determines whether exclusion most efficaciously serves that deterrence objective.

The decision to exclude evidence "'begin[s] with the premise that the challenged evidence is in some sense the product of illegal government activity.'" *Nix v. Williams*, 467 U.S. 431, 444 (1984) (citation omitted). But this Court has "declined to adopt a per se or 'but for' rule" that renders "inadmissible any evidence that came to light through a chain of causation that began with an illegal[ity]." *United States v. Leon*, 468 U.S. 897, 910-11 (1984). Causation is only a necessary—but not sufficient—predicate for suppression. *Hudson*, 547 U.S. at 592.

If a court finds causation, it may not exclude evidence unless doing so will "discourage law enforcement officials from violating the Fourth Amendment [in the future] by removing the incentive to disregard it." *Stone v. Powell*, 428 U.S. 465, 492 (1976). After all, that is why the Court adopted the exclusionary rule in the first place. *See Elkins v. United States*, 364 U.S. 206, 217 (1960). If officers know that courts will suppress evidence seized through unconstitutional conduct, they will be less likely to act unlawfully.

But the rule's focus on deterrence does not require suppressing everything "'which deters illegal searches.'" *Leon*, 468 U.S. at 910 (citation omitted). Exclusion must "yield '*appreciable* deterrence.'" *Davis*, 131 S.Ct. at 2426-27 (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)) (emphasis added). Suppressing evidence is a "drastic and socially costly" sanction. *Nix*, 467 U.S. at 442-43. "It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *Davis*, 131 S.Ct. at 2427 (citation omitted). Given that, the "deterrence benefits of suppression must outweigh its heavy costs." *Id.* (citations omitted).

Whether suppression's deterrence benefits outweigh its heavy costs depends largely on the officer's

culpability. *See Davis*, 131 S.Ct. at 2427-28. "When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Id.* at 2427 (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)). On the other hand, "when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id.* at 2427-28 (internal quotation marks and citations omitted).

Thus, the "harsh sanction of exclusion" is triggered "only when" the illegality is "deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the justice system.'" *Id.* at 2428 (quoting *Herring*, 555 U.S. at 144) (brackets in original). Suppression is not warranted for police mistakes short of "systemic error or reckless disregard of constitutional requirements." *Herring*, 555 U.S. at 147-48. A "criminal should not 'go free because the constable has blundered.'" *Id.* at 151 (quoting *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.)).

B. Under the attenuation exception, evidence is admissible when its discovery is so attenuated from the prior illegality that suppression would not appreciably deter future police misconduct.

Since adopting the exclusionary rule, this Court has developed various exceptions to it. The limiting principles discussed above animate those exceptions, which help to ensure that courts exclude evidence only when exclusion serves the rule's core purpose.

1. This case concerns the attenuation exception to the exclusionary rule. That exception considers whether "the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." *United States v. Crews*, 445 U.S. 463, 471 (1980). The attenuation inquiry "'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.'" *Leon*, 468 U.S. at 911 (quoting *Brown v. Illinois*, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part)).

Because "considerations relating to the exclusionary rule and the constitutional principles which it is designed to protect *must* play a factor in the attenuation analysis," *United States v. Ceccolini*, 435 U.S. 268, 279 (1978) (emphasis added), courts apply-

ing the attenuation exception must examine whether excluding the evidence will appreciably deter future constitutional violations. *Accord Brown*, 422 U.S. at 604 (applying attenuation exception with reference to "the [deterrence] policy served by the exclusionary rule").

Under this Court's precedents, deterrence depends largely on the nature of the intervening circumstances and "the culpability of the law enforcement conduct" in question. *Herring*, 555 U.S. at 143. The "purpose and flagrancy of the official misconduct" is "particularly" relevant in the attenuation analysis. *Brown*, 422 U.S. at 603-04.

2. To date, this Court has applied the attenuation exception to three different kinds of evidence obtained after a Fourth Amendment violation: confessions, lineup identifications, and live-witness testimony. But none of those cases announced a rigid list of factors governing the attenuation analysis in *every* case. Rather, the analysis with respect to each kind of evidence hinged on whether intervening events so attenuated the evidence from the initial illegality that exclusion would appreciably deter future constitutional violations. In each case, the Court tailored the considerations governing attenuation to the specific intervening events and challenged evidence before it.

Confessions. This Court first applied the attenuation exception to a confession obtained after an un-

lawful seizure. *Wong Sun v. United States*, 371 U.S. 471, 491 (1963). Wong Sun's initial arrest for drug crimes was unlawful, but he confessed days later and after a lawful arraignment. *See id.* In light of both the passage of time from the initial illegality and the intervening arraignment, the causal connection between the arrest and the confession "had 'become so attenuated as to dissipate the taint'" of the prior unlawful arrest. *Id.*

This Court expressly tied the attenuation analysis to the exclusionary rule's deterrence purpose in *Brown*, another confession case. Police officers unlawfully broke into Brown's apartment while he was gone, searched it, and arrested him—at gunpoint and without a warrant—when he returned home. *See* 422 U.S. at 593-94. At the police station, officers twice read Brown his *Miranda* rights. Brown nevertheless made statements in the ensuing hours that police turned into two written murder confessions. Brown signed the first confession, but refused to sign the second. *See id.* at 594-96. The state courts denied Brown's motion to suppress his confessions, agreeing with the State that the *Miranda* warnings were an intervening circumstance that necessarily attenuated Brown's confessions from his prior unlawful arrest. *See id.* at 596-97

This Court rejected the idea that *Miranda* warnings alone always sever the causal connection between an unlawful arrest and ensuing confessions.

See id. at 602. "If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted." *Id.* (citation omitted). Such a broad rule would potentially encourage unlawful seizures by sending the message that no matter how egregious the initial illegality or the exploitation of it to gain a confession, police could save the confession from exclusion merely by giving the warnings. *Id.*

Brown's core lesson is that whether a confession is sufficiently attenuated from an unlawful arrest "must be answered on the facts of each case," *id.* at 602, evaluated "in light of the [deterrence] policy served by the exclusionary rule," *id.* at 604. At least with respect to confessions, that requires courts to consider not only whether police gave *Miranda* warnings, but also the "temporal proximity of the arrest and the confession, the presence of [other] intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." *Id.* at 603-04 (citations omitted).

As applied in *Brown*, those considerations made suppressing the confessions an appropriate remedy. Mere hours had passed between the unlawful arrest and Brown's statements. And the "impropriety" of the unlawful arrest was "obvious"—something the two detectives "virtually conceded" in acknowledging

that their purpose in unlawfully breaking into Brown's apartment and arresting him at gunpoint was to question him "in the hope that something might turn up." *Id.* at 605.

Lineup identifications. This Court also applied the attenuation exception to a defendant's identification in a lineup following his unlawful arrest. *See Johnson v. Louisiana*, 406 U.S. 356 (1972). Johnson moved to suppress the lineup identification as the fruit of that unlawful arrest.

This Court held that the lineup identification was not excludable. By the time of the lineup, Johnson had been "brought before a committing magistrate to advise him of his rights and set bail." *Id.* at 365. That, the Court reasoned, attenuated the link between the unlawful arrest and the challenged lineup identification because Johnson was by then "under the authority" of the committing magistrate rather than the unlawful arrest. *Id.* Consequently, "the lineup was conducted not by 'exploitation' of the challenged arrest but 'by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* (quoting *Wong Sun*, 371 U.S. at 488).

Johnson's holding is at least impliedly linked to exclusion's deterrence purpose. The intervening circumstance—commitment by a magistrate—was significant. And the opinion does not suggest that the arrest was flagrantly unlawful, or that officers exploited the unlawful arrest to get the challenged

lineup identification. In such circumstances, excluding the lineup identification would do little to discourage future unlawful arrests.

Live-witness testimony. In *Ceccolini*, the Court applied the attenuation exception to hold admissible the live testimony of a woman whose identity as a witness was discovered through an unlawful search. 435 U.S. at 276. A police officer performed that unlawful search at a retail store, discovering evidence of illegal gambling activities. The store clerk, Lois Hennessey, implicated Ceccolini (without knowing of the unlawful search) and eventually voluntarily testified against Ceccolini before a grand jury investigating the gambling crimes. Ceccolini also testified before the grand jury and denied participating in gambling activities. The government ultimately charged Ceccolini with perjury for lying to the grand jury. *See id.* at 269-73.

This Court held that Hennessey's trial testimony was admissible because it was sufficiently attenuated from the officer's unlawful search in the retail store. *See id.* at 275-80. Once again, the Court focused on the exclusionary rule's deterrence objective. It emphasized that allowing a willing witness to testify would not incent police to conduct unlawful searches: "[t]he greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means, and concomitantly, the smaller the incentive to conduct an

illegal search to discover the witness." *Id.* at 276. The unique nature of live-witness testimony also supported the Court's conclusion that the cost of excluding a cooperative witness's testimony would be too high. "[S]uch exclusion would perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby." *Id.* at 277.

* * *

The foregoing cases teach that the considerations governing the attenuation analysis vary based on (1) the type of evidence alleged to be the fruit of the poisonous tree and (2) the circumstances of the case under review. But the attenuation inquiry's focus remains constant: whether "'the detrimental consequences of illegal police action become so attenuated'"—by time or other intervening circumstances—"'that the deterrent effect of the exclusionary rule no longer justifies its costs.'" *Leon*, 468 U.S. at 911 (quoting *Brown*, 422 U.S. at 609 (Powell, J., concurring in part)). That deterrence analysis focuses principally on the nature of the intervening circumstance and the culpability of the police misconduct.

C. Absent a flagrantly unlawful stop, suppressing evidence lawfully seized incident to an intervening warrant-arrest will not appreciably deter future police misconduct.

Like the intervening circumstances in *Wong Sun*, *Johnson*, and *Ceccolini*, a warrant-arrest can sufficiently attenuate evidence seized incident to that arrest from a prior non-flagrant, unlawful stop so as to make such evidence admissible.

1. In nearly all cases, excluding evidence lawfully seized incident to a warrant-arrest will not appreciably deter unlawful investigatory stops. An arrest warrant "'is a judicial mandate to an officer to . . . make an arrest, and the officer has a sworn duty to carry out its provisions.'" *Leon*, 468 U.S. at 921 n.21 (citation omitted). A "full search" of the arrestee is likewise reasonable under the Fourth Amendment. *United States v. Robinson*, 414 U.S. 218, 235 (1973). Even the Utah Supreme Court acknowledged that persons unlawfully stopped may be "lawfully arrested on an outstanding warrant" discovered during the stop, and that a search incident to that arrest is "perfectly appropriate." Pet. App. 32. Thus, suppression in a case like this cannot be justified as deterring the lawful arrest or the lawful search incident to arrest. *See New York v. Harris*, 495 U.S. 14, 20 (1990) (holding that the statement a suspect made while "in legal custody" was admissible because suppression would "not serve the purpose" of

the warrant requirement, which police had previously violated by a warrantless, in-home arrest).

Nor can extending the exclusionary rule to such lawfully acquired evidence generally be justified as necessary to deter unlawful investigatory stops in the first instance. In the vast majority of investigatory stops, officers will not find a pre-existing arrest warrant. The discovery of an outstanding warrant is an unlikely and chance event—one upon which an officer cannot safely rely. *See United States v. Green*, 111 F.3d 515, 523 (7th Cir. 1997) (recognizing that it is "the unusual case where the police, after a questionable stop, discover that [a detainee] is wanted on an arrest warrant"); *People v. Brendlin*, 195 P.3d 1074, 1081 (Cal. 2008), *cert. denied*, 556 U.S. 1192 (2009) (same). And officers know that, in the usual case, courts will suppress evidence discovered in an unlawful stop. This Court has long recognized that threat of suppression to be a substantial and abiding deterrent to unlawful police stops. *See, e.g.*, *Elkins*, 364 U.S. at 217 (concluding that exclusionary rule is "the only effectively available way" to deter future police misconduct).

Brown's concern—that officers have a guaranteed cure for their unlawful conduct merely by giving *Miranda* warnings after an unlawful arrest and before a defendant confesses—finds no analogue here. If *Miranda* warnings were sufficient to attenuate a confession from an unlawful arrest, officers could

disregard the Fourth Amendment as a matter of course, safe in the knowledge that *Miranda* warnings would cure the illegality in every case.

But unlike *Miranda* warnings given after an unlawful arrest, a pre-existing arrest warrant will not give officers a known, guaranteed fix before they conduct an unlawful stop. Officers cannot count on finding a warrant to effectively cure their constitutional violations. A warrant results entirely from the independent happenstance of a prior judicial finding of probable cause to arrest the stopped suspect on an unrelated crime, a predicate event completely outside officers' control. Thus, admitting evidence seized incident to a search on a lawful warrant-arrest would not "allow 'law enforcement officers to violate the Fourth Amendment with impunity,'" *Dunaway v. New York*, 442 U.S. 200, 219 (1979) (citation omitted); in most cases, no warrant will be found to save them from their misconduct. *See Harris*, 495 U.S. at 20 (concluding that "the principal incentive to obey" the warrant requirement for in-home arrests "still obtains" where police know that violations will result in suppression). Because suppression in these circumstances "fails to yield 'appreciable deterrence,' exclusion is 'clearly . . unwarranted.'" *Davis*, 131 U.S. at 2426-27 (quoting *Janis*, 428 U.S. at 454).

2. Any marginal potential to deter future unlawful investigatory stops does not justify the exceptionally high cost of suppressing evidence lawfully seized

incident to an intervening warrant-arrest. Since *Leon*, this Court has "recalibrated [the] cost-benefit analysis in exclusion cases to focus the inquiry on the 'flagrancy of the police misconduct' at issue." *Davis*, 131 S.Ct. at 2427 (quoting *Leon*, 468 U.S. at 909, 911). The assessment of flagrancy is "particularly" relevant in attenuation analysis, *Brown*, 422 U.S. at 604, just as it is in cases applying the good-faith exception to the exclusionary rule, *see Herring*, 555 U.S. at 143.

Indeed, *Brown's* flagrancy inquiry parallels the flagrancy inquiry in good-faith cases. "When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Davis*, 131 S.Ct at 2427 (internal quotation marks and citation omitted). But when they "act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force." *Id.* (internal quotation marks and citation omitted). That standard is not unlike the one applied in qualified immunity cases, which "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (2011).

And this Court has repeatedly made clear that courts analyze deterrence and culpability using an

"objective" inquiry, "not an inquiry into the subjective awareness of arresting officers." *Herring*, 555 U.S. at 145 (internal quotation marks and citations omitted). The flagrancy assessment is thus "'confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the [stop] was illegal' in light of 'all of the circumstances.'" *Id.* (quoting *Leon*, 468 U.S. at 922 n.23). To the extent that language in this Court's prior attenuation cases can be read to suggest that the inquiry turns on the arresting officer's subjective beliefs[3]—a reading some lower courts have adopted[4]—that language cannot be reconciled with this Court's acknowledgement that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the

---

[3] *See, e.g.*, *Ceccolini*, 435 U.S. at 279-80 (refusing to apply exclusionary rule partly because there was "not the slightest evidence to suggest" that officer's unlawful search was done "with the intent of finding tangible evidence bearing on an illicit gambling operation" or "with the intent of finding a willing and knowledgeable witness to testify against respondent"); *Brown*, 422 U.S. at 605 (concluding that officers arrested petitioner "in the hope that something might turn up").

[4] *See, e.g.*, *Brendlin*, 195 P.3d at 1081 (finding that record did not show the officer "'invented a justification for the traffic stop'") (citation omitted); *State v. Frierson*, 926 So.2d 1139, 1144-45 (Fla. 2006) (finding that record did not show the stop was "pretextual or in bad faith"), *cert. denied*, 549 U.S. 1082 (2006).

officer." *Horton v. California*, 496 U.S. 128, 138 (1990). To eliminate any confusion, this Court's opinion here should make clear that the flagrancy assessment in attenuation cases is an objective one.

Such an objective assessment counsels against excluding evidence seized incident to a warrant-arrest performed during an unlawful stop—like this one—based on "a misjudgment"; a "single misstep over the constitutional boundary" rather than an obvious Fourth Amendment violation. Pet. App. 71. Police errors of that sort are "far removed from the core concerns that led [this Court] to adopt the rule in the first place." *Herring*, 555 U.S. at 144. A warrant-arrest performed during a stop based on a reasonable misjudgment in applying the law to the facts parallels the kind of conduct that this Court has emphasized does not justify the harsh penalty of exclusion. *See, e.g., id.* at 145 (holding that evidence was admissible when obtained by objectively reasonable but mistaken reliance on a warrant's existence).

In fact, from *Herring*'s conclusion—that suppression serves no deterrence purpose when officers arrest a suspect pursuant to a *nonexistent* warrant—it surely follows that suppression would serve no deterrence purpose when officers arrest a suspect, like Strieff, pursuant to an *actual* warrant.

Those same principles also explain why the attenuation exception would not save evidence seized following an intervening warrant-arrest when police

discover the warrant in a random, dragnet-type, or otherwise arbitrary stop. Police should know that such conduct is "obvious[ly]" unlawful, *Brown*, 422 U.S. at 605, making suppression a potentially appropriate remedy to discourage other officers from "reckless[ly] disregard[ing] . . . constitutional requirements," *Herring*, 555 U.S. at 147-48. And targets of random or dragnet-type stops "not named in warrants would have good Fourth Amendment claims" for damages against the officers. *Atkins v. City of Chicago*, 631 F.3d 823, 827 (7th Cir. 2011). That suppression or damages may be warranted in response to such flagrant violations, however, only bolsters the conclusion that courts should admit the evidence when the violation is an objectively reasonable good-faith mistake.

3. The conclusion that a warrant-arrest can attenuate the taint of a prior unlawful stop is consistent with the cost-benefit analysis in this Court's prior attenuation cases. As discussed, "[n]o single fact is dispositive" to the analysis, which "must be answered on the facts of each case," *Brown*, 422 U.S. at 603, in light of "the fundamental tenets of the exclusionary rule," *Ceccolini*, 435 U.S. at 274, and the "constitutional principles which it is designed to protect," *id.* at 279.

Most important, an arrest on an outstanding warrant is an "intervening circumstance[]," *Brown*, 422 U.S. at 603, of considerable significance. Com-

pared to a defendant's confession or consent-to-search, a warrant-arrest represents "an even more compelling case for the conclusion that the taint of the original illegality is dissipated." *Green*, 111 F.3d at 522. Unlike a confession or consent-to-search, "[a] warrant is not reasonably subject to interpretation or abuse." *Brendlin*, 195 P.3d at 1080 (citing *Green*, 111 F.3d at 522). The validity of a pre-existing warrant does not turn on an evaluation of the complex "workings of the [defendant's] mind," *Brown*, 422 U.S. at 603—it is "completely independent of the circumstances that led the officer to initiate" the stop, *Brendlin*, 195 P.3d at 1080. It results from a judicial officer's prior assessment that all constitutional prerequisites to arresting the suspect had been satisfied on facts unrelated to the stop under review. In that regard, a warrant-arrest closely resembles the "lawful arraignment" of a defendant before the confession, *Wong Sun*, 371 U.S. at 491, or the "commitment" by a magistrate before a defendant's lineup, *Johnson*, 406 U.S. at 365—intervening circumstances that purged the taint of prior police misconduct.

Accordingly, unless a flagrant illegality led to the warrant's discovery, excluding evidence lawfully seized incident to a warrant-arrest cannot pay its way.

D. Because Detective Fackrell's investigatory stop was not flagrantly unlawful, suppressing the evidence lawfully seized incident to Strieff's arrest will not appreciably deter future misconduct.

Detective Fackrell's investigatory stop of Strieff was not flagrantly unlawful. Strieff's arrest on the outstanding warrant was therefore an intervening event that severed the causal link between the unlawful arrest and the evidence such that excluding it will not appreciably deter future unlawful stops.

To justify an investigatory stop, an officer must be able to identify "specific and articulable facts which, taken together with rational inferences from those facts," *Terry*, 392 U.S. at 21, support a reasonable belief that "criminal activity may be afoot," *id.* at 30. That calculus "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citation omitted). Although the reasonable suspicion standard requires more than "a mere 'hunch,'" it presents a relatively low bar: "the likelihood of criminal activity need not rise to the level of probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *Id.* at 274.

Here, police received an anonymous tip that "narcotics activity," including "short stay traffic," was occurring in a house. J.A. 15; Pet. App. 4. Detective Fackrell intermittently watched the house for some three hours over the course of a week. J.A. 16. He saw short-stay traffic that, although "not terribly frequent," was "frequent enough that it raised [the] suspicion" of this experienced and well-trained narcotics detective, and corroborated the tip. J.A. 16; *cf. State v. Alverez*, 2006 UT 61, ¶18, 147 P.3d 425 (recognizing two short-term visits from same individual as consistent with drug-dealing). The visits were "more than" the detective would "see at a regular house" and their duration was significant—visitors would "stay and then leave" within "[j]ust a couple of minutes." J.A. 16-17, 23. So when Detective Fackrell saw Strieff leave the house, "the same as other people had done," he stopped Strieff to ask "what he was doing there." J.A. 18, 20-21.

The prosecutor later conceded that although the question was "extremely close," the facts "d[id]n't quite meet the level of reasonable suspicion." J.A. 24. The Utah Supreme Court implied that the missing fact was Strieff's arrival time—a fact necessary for Detective Fackrell to infer that he was another short-term visitor buying drugs. *See* Pet. App. 5 (observing that Detective Fackrell "had not seen Strieff enter the house" and thus "did not know how long [Strieff] had been there"). But no court has questioned that Detective Fackrell's decision to stop

Strieff under those facts was anything more than "a misjudgment"—"a single misstep over the constitutional boundary"—rather than an obvious Fourth Amendment violation. Pet. App. 71.

This Court recently recognized that an anonymous tip "can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion' when combined with sufficient corroboration, which may include the confirmation of predicted behavior or even innocent details. *See Navarette v. California*, 134 S.Ct. 1683, 1688 (2014). And it is not unreasonable for an officer to infer that visitors to a home are engaged in a common enterprise with its residents. *Cf. Wyoming v. Houghton*, 526 U.S. 295, 304-05 (1999) (recognizing reasonable inference that "a car passenger . . will often be engaged in a common enterprise with the driver"). In light of this Court's jurisprudence and the totality of the circumstances, a "'reasonably well-trained officer'" in Detective Fackrell's shoes could reasonably misjudge that those facts amounted to reasonable suspicion that Strieff was either a short-term visitor buying drugs or a resident selling them. *Herring*, 555 U.S. at 145 (quoting *Leon*, 468 U.S. at 922 n.23).

Given the tip, Detective Fackrell's efforts to corroborate it, and this Court's Fourth Amendment jurisprudence, it cannot be said that the investigatory stop was an "obvious" Fourth Amendment violation, *Brown*, 422 U.S. at 605, or that Detective Fackrell

otherwise acted in "reckless disregard of constitutional requirements." *Herring*, 555 U.S. at 147-48. The stop was at worst a "reasonable but mistaken judgment[]" in applying the reasonable suspicion standard to the facts confronting the detective at the time of the stop. *al-Kidd*, 131 S.Ct. at 2085.

Because Detective Fackrell's initial stop of Strieff was not flagrantly unlawful, suppressing the evidence seized incident to the intervening warrant-arrest will not appreciably deter future unlawful stops. Accordingly, the attenuation exception makes that evidence admissible.

II. THE UTAH SUPREME COURT ERRONEOUSLY HELD THAT THE ATTENUATION EXCEPTION NEVER APPLIES TO THE PRE-EXISTING WARRANT SCENARIO.

The Utah Supreme Court held that the attenuation exception does not apply to intervening warrant-arrests for three reasons. First, it read this Court's cases as applying the exception only to intervening circumstances that involve a defendant's independent acts of free will, such as a confession or consent to search. Pet. App. 27-31. Second, it reasoned that the "discovery of an outstanding warrant" during an unlawful stop cannot be considered an "intervening" or "superseding" cause under the tort theory of proximate causation. Pet. App. 28-29. Third, it concluded that applying the exception in this context would

"eviscerate" or "swallow" the inevitable discovery exception. Pet. App. 31-34.

The Utah Supreme Court's reasoning cannot be squared with the lessons of this Court's attenuation cases. First, as explained, the attenuation exception not only applies to scenarios other than those involving a suspect's free will but is also particularly well suited to promoting the exclusionary rule's deterrence purpose in the pre-existing warrant scenario. Second, the attenuation exception derives from the deterrent value of suppression, not from the tort theory of proximate causation. Finally, exceptions to the exclusionary rule are not mutually exclusive; suppression is not warranted if any one of them applies.

A. The attenuation exception is well suited to promoting the exclusionary rule's deterrence purpose in the pre-existing warrant scenario.

The Utah Supreme Court concluded that the attenuation exception applies only when the evidence obtained after an unlawful stop "involv[es] a defendant's independent acts of free will," such as a confession or consent to search. Pet. App. 27. It based that conclusion on its mistaken belief that "[t]o date, the United States Supreme Court's attenuation cases have all involved *confessions* made by unlawfully detained individuals." *Id.* at 20 & n.4 (citing *Kaupp v. Texas*, 538 U.S. 626 (2003); *Taylor v. Alabama*, 457

U.S. 687 (1982); *Dunaway*, 442 U.S. at 219; *Brown*, 422 U.S. at 605; *Wong Sun*, 371 U.S. at 478-79). It then reasoned that the factors this Court applied in confession cases to assess attenuation were "ill-suited to the outstanding warrant scenario." Pet. App. 30.

The Utah court's conclusion proceeds from two faulty premises. First, as discussed in Section I.B *supra*, this Court has applied the attenuation exception to hold admissible two kinds of evidence that have nothing to do with a defendant's independent acts of free will: (1) live-witness testimony by persons *other than* the defendant, *Ceccolini*, 435 U.S. at 275-78; and (2) a lineup identification of the defendant obtained after the defendant's unlawful arrest when the defendant was being held on a magistrate's commitment, *Johnson*, 406 U.S. at 365. The Utah Supreme Court's assumption that *Kaupp*, *Taylor*, *Dunaway*, *Brown*, and *Wong Sun* "is a complete list of United States Supreme Court cases applying the attenuation doctrine," Pet. App. 20 n.4 (emphasis omitted), is therefore wrong.

Overlooking *Ceccolini* and *Johnson* led the Utah Supreme Court to its second faulty premise—that *Brown* announced a rigid list of factors governing the analysis in *every* attenuation case. If that premise were true—and it is not—*Johnson* (which predates *Brown* by three years) and *Ceccolini* (which did not apply the three *Brown* factors) necessarily were

wrongly decided. And because those cases are correct, the Utah Supreme Court should have instead followed *Ceccolini*'s teachings that the factors relevant in any given attenuation case are drawn from "the fundamental tenets of the exclusionary rule," 435 U.S. at 274, and will vary depending on the nature of the intervening circumstance, *id.* at 278-79. *Ceccolini* itself finds support in *Brown*'s statement that "[n]o single fact is dispositive" to the attenuation analysis, which "must be answered on the facts of each case." 422 U.S. at 603.

The latitude this Court affords for context-specific attenuation analysis logically follows from the Court's equally longstanding recognition that "considerations relating to the exclusionary rule and the constitutional principles which it is designed to protect *must* play a factor in the attenuation analysis." *Ceccolini*, 435 U.S. at 279 (emphasis added). The "harsh sanction of exclusion" is triggered "only when" the illegality is "deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the justice system.'" *Davis*, 131 S.Ct. at 2428 (quoting *Herring*, 555 U.S. at 144) (brackets in original). *Ceccolini* and *Brown* reflect the flexibility courts need to ensure their analysis focuses on those proper ends.

The Utah Supreme Court's error epitomizes the error that lower courts commit in the attenuation analysis when the intervening event is a warrant-

arrest: courts become preoccupied with whether all of the factors that *Brown* identified as relevant to attenuation in confession cases would be logically relevant in the outstanding-warrant scenario, and treat *Brown* as creating a rigid test for *all* attenuation cases rather than setting forth considerations relevant to a confession case. *See* Pet. App. 27-31. Those errors stem from treating the factors as ends in themselves, rather than as a means to the end of resolving the controlling question: Will applying the exclusionary rule in the circumstances under review appreciably deter future constitutional violations?

B. The attenuation exception is not based on the tort theory of proximate causation, but on the deterrent value of suppression.

The Utah Supreme Court also held that "to the extent the attenuation doctrine is about" the tort theory "of proximate cause," the "discovery of an outstanding warrant," Pet. App. 29, cannot be treated as an intervening circumstance "sufficient to break the proximate connection to the initial violation of the Fourth Amendment," *id.* at 28. In the court's view, a warrants check "is part of the natural, ordinary course of events arising out of an arrest or detention," so "even if the warrant could be thought of as somehow intervening, it would hardly be unforeseeable"—a requirement for finding a superseding cause under tort law. *Id.* at 29.

This conclusion also proceeds from two faulty premises. First, the intervening circumstance is not the "discovery of an outstanding warrant," but the warrant-arrest itself. Second, the attenuation exception is not based on the tort-law concept of proximate cause. Rather, the exception "'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the *deterrent effect of the exclusionary rule no longer justifies its cost*.'" *Leon*, 468 U.S. at 911 (quoting *Brown*, 422 U.S. at 609 (Powell, J., concurring in part)) (emphasis added). Attenuation turns on "a rigorous weighing of [exclusion's] costs and deterrence benefits," with particular focus "on the 'flagrancy of the police misconduct' at issue." *Davis*, 131 S.Ct. at 2427 (citations omitted). An obvious Fourth Amendment violation or reckless disregard for Fourth Amendment rights supports exclusion, but officers' misconduct based on "an objectively 'reasonable good-faith belief' that their conduct is lawful" weighs against it. *Id.* Tort principles provide no basis for refusing to apply the attenuation exception in the outstanding-warrant scenario.

C. Exceptions to the exclusionary rule are not mutually exclusive; suppression is not warranted if any one of them applies.

Finally, the Utah Supreme Court held that the attenuation exception cannot apply to the pre-existing warrant scenario because to do so would "eviscerate" or "swallow" another exception to the

exclusionary rule—the inevitable discovery exception. Pet. App. 31-34. According to the court, the facts in cases involving a pre-existing warrant resemble those in cases applying the inevitable discovery exception: both involve "two parallel acts of police work—one unlawful and the other lawful." *Id.* at 3. The court thought it "entirely arbitrary to subject most lawful police work (pursued in tandem with *unlawful* activity) to the high bar of inevitable discovery while lowering the bar for arrests incident to an outstanding warrant." *Id.* at 34. Accordingly, the court concluded that this Court's precedents "dictate the applicability" of the inevitable discovery exception, rather than the attenuation exception, to outstanding warrant cases. *Id.* at 3.

That conclusion also rests on a faulty premise—that the exclusionary rule's exceptions are mutually exclusive. They are not. Each exception to the exclusionary rule is a means to enforce the rule's limited purpose of appreciably deterring future constitutional violations. That end does not require courts to apply one—and only one—exception to a particular scenario. More than one exception can apply to any given set of facts. And if a court decides that one exception does not apply, nothing in the exclusionary rule precludes it from considering whether another exception might apply. *Cf. Crews*, 445 U.S. at 470 (not taking issue with lower court considering "whether *any* of three commonly advanced exceptions to the exclusionary rule—the 'independent

source,' 'inevitable discovery,' or 'attenuation' doctrines—nonetheless justified" the admission of evidence) (emphasis added).

The Utah Supreme Court's concern about improperly intruding on territory somehow reserved for the inevitable discovery exception is groundless in any event. The inevitable discovery exception permits admitting evidence when a court cannot say that "the challenged evidence would not have been obtained *but for* [the] constitutional violation." *United States v. Scott*, 270 F.3d 30, 44-45 (1st Cir. 2001) (emphasis added). That, in turn, ensures that the government will "not [be] put in a worse position simply because of some earlier police error or misconduct." *Nix*, 467 U.S. at 443. The inevitable discovery exception homes in on the predicate for exclusion: whether the evidence was *necessarily* the product of unlawful police conduct. When police inevitably would have found the evidence through separate legal means, it cannot be said in the broader picture that the evidence was necessarily the product of the unlawful conduct.

In contrast, the attenuation exception *presumes* that the challenged evidence would not have been obtained *but for* the constitutional violation, but nevertheless allows the evidence's admission *despite* that unlawful conduct when, because of intervening circumstances, "'the deterrent effect of the exclusionary rule no longer justifies its costs.'" *Leon*, 468

U.S. at 911 (quoting *Brown*, 422 U.S. at 609 (Powell, J., concurring in part)). If the requirements of either exception are met, exclusion is not appropriate.

The Utah Supreme Court recognized that there had been no showing that "Strieff might ultimately have had [the] contraband in his possession on any future date on which he may have been arrested on the outstanding warrant." Pet. App. 32-33. And indeed, for that reason, an inevitability showing is "difficult at best" when outstanding warrants are discovered during an unlawful stop. Pet. App. 32. But that misses the point. The ultimate question is whether excluding the lawfully seized evidence would appreciably promote the exclusionary rule's purpose. The Utah Supreme Court never answered that question.

* * *

The evidence that Detective Fackrell lawfully seized from Strieff following his lawful warrant-arrest should be admissible under the attenuation exception to the exclusionary rule. Detective Fackrell's investigatory stop was not flagrantly unlawful. Accordingly, the evidence did not come "by exploitation" of the challenged stop, but "by means sufficiently distinguishable to be purged of the primary taint," *Wong Sun*, 371 U.S. at 488—the lawful arrest on the outstanding warrant. In these circumstances, excluding the lawfully seized evidence will

not appreciably deter future unlawful investigatory stops.

CONCLUSION

This Court should reverse the judgment of the Utah Supreme Court.

Respectfully submitted.

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
LAURA B. DUPAIX
Deputy Solicitor General
THOMAS B. BRUNKER
Criminal Appeals Director
JEFFREY S. GRAY
Search & Seizure Section
Director
Counsel for Petitioner
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@utah.gov

**Counsel of Record*

No. 14-1373

In the Supreme Court of the United States

UTAH,

Petitioner,

v.

EDWARD JOSEPH STRIEFF, JR.,

Respondent.

On Writ of Certiorari to the Utah Supreme Court

BRIEF FOR RESPONDENT

STUART BANNER
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095

PATRICK L. ANDERSON
JOAN C. WATT
Counsel of Record
Salt Lake Legal Defender Association
424 E. 500 South, Ste. 300
Salt Lake City, UT 84111
(801) 532-5444
jwatt@sllda.com

QUESTION PRESENTED

Whether the evidence seized from respondent incident to his arrest on a minor traffic warrant discovered during a patently unconstitutional detention is inadmissible under the "attenuation" exception to the exclusionary rule.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 1

A. Background 1

1. Arrest warrants 1

2. Routine warrant checks 5

B. Facts and proceedings below 13

SUMMARY OF ARGUMENT 17

ARGUMENT 22

The evidence seized from Edward Strieff is inadmissible under the "attenuation" exception to the exclusionary rule, because it was obtained as a direct consequence of a patently unconstitutional detention. 22

A. Where the police make an unlawful stop and run a routine warrant check, the discovery of a warrant does not attenuate the causal connection between the unlawful stop and the ensuing search. 23

1. The discovery of the warrant in these circumstances is an immediate and foreseeable consequence of the stop and the warrant check. 25

2. The interest protected by the Fourth Amendment—the interest in not being wrongfully detained by the police—is precisely the one that is served by suppression. 39

3. The United States' argument concerning identity-related evidence is misplaced in this case and is incorrect in any event. 44

B. The exclusionary rule is necessary to deter the police from making unconstitutional stops to run routine warrant checks. 48

CONCLUSION 58

TABLE OF AUTHORITIES

CASES

Arizona v. Evans, 514 U.S. 1 (1995) 12, 13
Arizona v. Gant, 556 U.S. 332 (2009) 54
Brinegar v. United States, 338 U.S. 160 (1949) 57
Brown v. Illinois, 422 U.S. 590 (1975) 15, 16, 26, 27, 28, 30, 32, 33, 34, 36
Brown v. Texas, 443 U.S. 47 (1979) 34, 37
Davis v. Mississippi, 394 U.S. 721 (1969) 46
Davis v. United States, 131 S. Ct. 2419 (2011) 23, 37, 38, 41, 48
Delaware v. Prouse, 440 U.S. 648 (1979) 37, 46
Dunaway v. New York, 442 U.S. 200 (1979) 27, 30, 33, 34
Elkins v. United States, 364 U.S. 206 (1960) 40
Florence v. Board of Chosen Freeholders, 132 S. Ct. 1510 (2012) 12
Florida v. J.L., 529 U.S. 266 (2000) 36
Floyd v. City of New York, 283 F.R.D. 153 (S.D.N.Y. 2012) 6, 11
Frisbie v. Collins, 342 U.S. 519 (1952) 47
Gerstein v. Pugh, 420 U.S. 103 (1975) 47
Golphin v. State, 945 So. 2d 1174 (Fla. 2006) 5
Groves v. Croft, 2011 WL 5509028 (D. Mont. 2011) 8
Hayes v. Florida, 470 U.S. 811 (1985) 10, 46
Herring v. United States, 555 U.S. 135 (2009) 12, 32, 34, 48, 49, 55
Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177 (2004) 10

Hudson v. Michigan, 547 U.S. 586 (2006) 24, 40, 41, 42, 48, 55, 56
Illinois v. Krull, 480 U.S. 340 (1987) 38, 50
Illinois v. Wardlow, 528 U.S. 119 (2000) 34
INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) 47
Johnson v. Louisiana, 406 U.S. 356 (1972) 43, 44
Johnson v. United States, 333 U.S. 10 (1948) 40
Jones v. United States, 357 U.S. 493 (1958) 40
Kaupp v. Texas, 538 U.S. 626 (2003) 26, 30, 33, 34
Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U.S. 469 (1876) 28
Murray v. United States, 487 U.S. 533 (1988) 23
Nardone v. United States, 308 U.S. 338 (1939) 24
Navarette v. California, 134 S. Ct. 1683 (2014) 35
New York v. Harris, 495 U.S. 14 (1990) 42, 44
Nix v. Williams, 467 U.S. 431 (1984) 23
Ornelas v. United States, 517 U.S. 690 (1996) 35
People v. Mitchell, 824 N.E.2d 642 (Ill. App. Ct. 2005) 6, 51
Rawlings v. Kentucky, 448 U.S. 98 (1980) 29, 33
Rodriguez v. United States, 135 S. Ct. 1609 (2015) 10, 36
Segura v. United States, 468 U.S. 796 (1984) ... 43, 44
State v. Bailey, 338 P.3d 702 (Or. 2014) 51
State v. Grayson, 336 S.W.3d 138 (Mo. 2011) 51
State v. Hummons, 253 P.3d 275 (Ariz. 2011) 51
State v. Jackson, 542 N.W.2d 842 (Iowa 1996) 8

State v. Johnson, 645 N.W.2d 505 (Minn. 2002) 8
State v. Jones, 17 P.3d 359 (Kan. 2001) 6
State v. Mazuca, 375 S.W.3d 294 (Tex. Crim. App. 2012) 51
State v. Moralez, 300 P.3d 1090 (Kan. 2013) 50
State v. Shaw, 64 A.3d 499 (N.J. 2012) 51
State v. Topanotes, 76 P.3d 1159 (Utah 2003) 5
State v. Winbush, 152 Wash. App. 1020 (Wash. Ct. App. 2009) 8
Taylor v. Alabama, 457 U.S. 687 (1982) 26, 30, 33, 34
Terry v. Ohio, 392 U.S. 1 (1968) ..... passim
Tolentino v. New York, No. 09-11556, *cert. dismissed as improvidently granted*, 563 U.S. 123 (2011) 44
Torres v. State, 341 P.3d 652 (Nev. 2015), *pet. for cert. pending*, No. 15-5 (filed June 26, 2015) 7
Union Pac. Ry. Co. v. Botsford, 141 U.S. 250 (1891) 40
United States v. Arvizu, 534 U.S. 266 (2002) 35
United States v. Ceccolini, 435 U.S. 268 (1978) 27, 29, 33
United States v. Cortez, 449 U.S. 411 (1981) 35
United States v. Crews, 445 U.S. 463 (1980) 46
United States v. Green, 111 F.3d 515 (7th Cir. 1997) 54
United States v. Gross, 662 F.3d 393 (6th Cir. 2011) 53

United States v. Leon, 468 U.S. 897 (1984) 23, 25, 38
United States v. Lopez, 443 F.3d 1280 (10th Cir. 2006) 8
United States v. Peltier, 422 U.S. 531 (1975) 50
United States v. Smith, 155 F.3d 1051 (9th Cir. 1998) 24
United States v. Sokolow, 490 U.S. 1 (1989) 35
United States v. Tuttle, 2015 WL 5736905 (D. Ariz. 2015) 6
United States v. Wade, 388 U.S. 218 (1967) 46
Wong Sun v. United States, 371 U.S. 471 (1963) 27, 29
Ybarra v. Illinois, 444 U.S. 85 (1979) 35

OTHER AUTHORITIES

Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 Ohio St. J. Crim. L. 463 (2009) 24
Associated Press, *Pa. Database: 1.4 Million Warrants Unserved*, NBC News, Apr. 8, 2007 2
Ian Ayres and Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department* (2008) 12
Al Baker, *Brooklyn Program Erasing Warrants for Low-Level Offenses*, N.Y. Times, Oct. 7, 2015 2
Bethany Barnes, *North Las Vegas to Pursue 33,000 Warrant Backlog*, Las Vegas Review-Journal, Jan. 18, 2015 3

Bureau of Justice Statistics, *Improving Access to and Integrity of Criminal History Records* (2005) 13
Dan B. Dobbs et al., *The Law of Torts* (2d ed., Westlaw) 28
Robert Faturechi and Jack Leonard, *Errant Jailings Focus of Probe*, L.A. Times, Dec. 28, 2011 12
Federal Bureau of Investigation, *National Crime Information Center* 5
Final Report of the President's Task Force on 21st Century Policing (2015) 10
Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. of the Am. Statistical Ass'n 813 (2007) 11
Jon B. Gould and Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 Criminology & Pub. Pol'y 315 (2004) 11
Erin Hartness, *Durham Cutting Into Warrant Backlog*, WRAL, May 12, 2009 3
Eric Helland and Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. L. & Econ. 93 (2004) 2, 3
W. Page Keeton et al., eds., *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 28
Kimbriell Kelly et al., *Forced Reforms, Mixed Results*, Washington Post, Nov. 13, 2015 53
Kentucky Legislative Research Commission, *Improved Coordination and Information*

Could Reduce the Backlog of Unserved Warrants (2005) 3
Michael Kimberly, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 Yale L.J. 177 (2008) 9
Saki Knafo, *How Aggressive Policing Affects Police Officers Themselves*, The Atlantic, July 13, 2015 10
Sharon LaFraniere and Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. Times, Oct. 24, 2015 11
Ray Leszcynski, *Mesquite Dedicates Friday Court Sessions to 31,000-Warrant Backlog*, Dallas Morning News, July 23, 2015 ..... 3, 4
Bill Lockyer, *Leadership Issues in Criminal Justice Policy*, 33 McGeorge L. Rev. 665 (2002) 2
Massachusetts Senate Committee on Post Audit and Oversight, *Warranting Improvement: Reforming the Arrest Warrant Management System* (1999) 2
The New York City Police Department's "Stop and Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General (1999) 11
Becky Pallack, *City Plans Amnesty Day for Those with Arrest Warrants*, Arizona Daily Star, May 19, 2015 ..... 3, 4
Restatement (Second) of Torts 29
Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 Minn. L. Rev. 1343 (2015) 53

Stuart M. Speiser et al., *The American Law of Torts* (2008) 28
Jen Steer, *Ohio Attorney General to Hold Fugitive Safe Surrender Event in Canton*, Fox 8 Cleveland, Sept. 26, 2015 3
U.S. Department of Justice, *Implementing a Comprehensive Performance Management Approach in Community Policing Organizations: An Executive Guidebook* (2015) 9
U.S. Department of Justice, *Investigation of the Ferguson Police Department* (2015) 1, 4, 7, 8, 56
Philip J. Van de Veer, *No Bond, No Body, and No Return of Service: The Failure to Honor Misdemeanor and Gross Misdemeanor Warrants in the State of Washington*, 26 Seattle U.L. Rev. 847 (2003) 2
Matt Zapotosky, *3 Charged in Killing as Pr. George's Steps Up Anti-Crime Effort*, Washington Post, Jan. 19, 2011 3

STATEMENT

A. Background

The police in some jurisdictions run routine warrant checks on the people they encounter, regardless of whether the police have particularized suspicion that the person being stopped is involved in criminal activity, and regardless of whether they have any reason to believe that the person being stopped has any outstanding warrants. The question presented in this case cannot be understood without an appreciation of this context.

1. Arrest warrants

There are many millions of outstanding arrest warrants in the United States, enough to cover a very large percentage of the population. Most of these arrest warrants are for traffic violations. While there do not appear to be any publicly-available nationwide data, the state-wide and city-wide figures that are available present a sobering picture.

In Ferguson, Missouri, for example, a city with a population of 21,000, the Justice Department found that more than 16,000 people have outstanding arrest warrants. U.S. Department of Justice, *Investigation of the Ferguson Police Department* 6, 55 (2015) (http://goo.gl/AFQDW3). In fiscal year 2013 alone, Ferguson issued arrest warrants to more than 9,000 people, nearly half the city's population. *Id.* at 55. Some of the neighboring jurisdictions likely have a comparable percentage of residents with outstanding warrants. *Id.* at 57 (noting "the large number of mu-

nicipalities in the region, many of which have warrant practices similar to Ferguson").

Ferguson is hardly the only jurisdiction with an enormous number of outstanding arrest warrants. New York City has 1.2 million outstanding warrants, some dating back to the 1970s. Al Baker, *Brooklyn Program Erasing Warrants for Low-Level Offenses*, N.Y. Times, Oct. 7, 2015 (http://nyti.ms/1Ll˙L5b). In 2002, California's Attorney General reported that "we have 2.5 million unserved warrants in this state," and that figure did not include warrants for incidents of domestic violence or for failure to appear in court. Bill Lockyer, *Leadership Issues in Criminal Justice Policy*, 33 McGeorge L. Rev. 665, 668 (2002). In 2007, Pennsylvania had 1.4 million outstanding warrants. Associated Press, *Pa. Database: 1.4 Million Warrants Unserved*, NBC News, Apr. 8, 2007 (http://goo.gl/3Yq3Nd). Massachusetts had more than 775,000 in 1999. Massachusetts Senate Committee on Post Audit and Oversight, *Warranting Improvement: Reforming the Arrest Warrant Management System* 7, 13 n.49 (1999) (https://goo.gl/gsdrJL).

In 2003, officials in Washington estimated that the state had around 370,000 outstanding warrants. Philip J. Van de Veer, *No Bond, No Body, and No Return of Service: The Failure to Honor Misdemeanor and Gross Misdemeanor Warrants in the State of Washington*, 26 Seattle U.L. Rev. 847, 852 n.33 (2003). Florida has reported 323,000 outstanding arrest warrants. Eric Helland and Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. L. & Econ. 93, 98 (2004). As of 2005, Kentucky had any-

where from 265,000 to 385,000—no one knew for sure, because of the lack of any statewide system for keeping track. Kentucky Legislative Research Commission, *Improved Coordination and Information Could Reduce the Backlog of Unserved Warrants* vii (2005) (http://goo.gl/6jCYHU).

Smaller jurisdictions report even larger numbers of outstanding arrest warrants relative to the size of the jurisdiction. As of a few years ago, Cincinnati had over 100,000 (one for every three residents), counting only warrants for failure to appear in court, and Baltimore had 54,000. Helland and Tabarrok, *supra*, at 98. Durham, North Carolina, had more than 60,000, some dating back to the 1970s. Erin Hartness, *Durham Cutting Into Warrant Backlog*, WRAL, May 12, 2009 (http://goo.gl/2hM1Ss). Prince George's County, Maryland, had 53,000 as of 2011. Matt Zapotosky, *3 Charged in Killing as Pr. George's Steps Up Anti-Crime Effort*, Washington Post, Jan. 19, 2011 (http://goo.gl/N3t4C3).

Tucson has 40,000 outstanding arrest warrants. Becky Pallack, *City Plans Amnesty Day for Those with Arrest Warrants*, Arizona Daily Star, May 19, 2015 (http://goo.gl/fmA6aB). North Las Vegas, Nevada, has 33,000. Bethany Barnes, *North Las Vegas to Pursue 33,000 Warrant Backlog*, Las Vegas Review-Journal, Jan. 18, 2015 (http://goo.gl/zx2IFT). Mesquite, Texas, has 31,000. Ray Leszcynski, *Mesquite Dedicates Friday Court Sessions to 31,000-Warrant Backlog*, Dallas Morning News, July 23, 2015 (http://goo.gl/6gpRp5). Stark County, Ohio, has 25,000. Jen Steer, *Ohio Attorney General to Hold*

Fugitive Safe Surrender Event in Canton, Fox 8 Cleveland, Sept. 26, 2015 (http://goo.gl/lHH4Ht).

So far as data are available, the vast majority of these outstanding arrest warrants are for failure to pay traffic tickets. In Ferguson, for example, the Justice Department found that such warrants "are overwhelmingly issued in non-criminal traffic cases that would not themselves result in a penalty of imprisonment." *Investigation of the Ferguson Police Department* at 56. The pattern is similar in other jurisdictions. For example, in Tucson and Mesquite most of the outstanding warrants are for failing to pay traffic tickets. Pallack, *supra*; Leszcynski, *supra*.

The present case is typical in this respect. Edward Strieff's outstanding warrant was a "small traffic warrant." JA 19.

In towns with exceptionally large numbers of outstanding arrest warrants, the police can be confident that a substantial percentage of the people they meet on the street will have an outstanding arrest warrant. In Ferguson, for example, that figure exceeds 75%. *Investigation of the Ferguson Police Department* at 6, 55. But every town has residents with outstanding arrest warrants, because traffic infractions are committed by residents of all towns, and anyone who fails to pay a traffic ticket is likely to be named in an outstanding arrest warrant.

Meanwhile, technological changes over the past few decades permit the police to run nationwide warrant checks, quickly and easily, on everyone they meet. Jurisdictions throughout the nation enter their arrest warrants into the FBI's National Crime

Information Center database. This database is available to law enforcement officers all over the country, who can access it on their computers. The FBI's website explains that "a law enforcement officer can search NCIC during a traffic stop to determine ... if the driver is wanted by law enforcement. The system responds instantly." Federal Bureau of Investigation, *National Crime Information Center* (https://www.fbi.gov/about-us/cjis/ncic). The police thus have access to "an electronic clearinghouse of crime data that can be tapped into by virtually every criminal justice agency nationwide, 24 hours a day, 365 days a year," a database that in 2014 processed an average of 12 million transactions every day. *Id.*

2. Routine warrant checks

Equipped with this ability to detect whether a person has an outstanding arrest warrant, police officers in some jurisdictions "view a warrants check as a routine feature of almost any citizen encounter," regardless of whether the police have reasonable suspicion to detain the person they are stopping. *Golphin v. State*, 945 So. 2d 1174, 1202 (Fla. 2006) (Pariente, J., concurring in result only). In Salt Lake County, Utah, where the events giving rise to the present case took place, the police "perform a warrants check as part of 'routine procedure' or 'common practice'" even where they do "not have an articulable suspicion that [the person they encounter] had [committed] or was about to commit a crime." *State v. Topanotes*, 76 P.3d 1159, 1160 (Utah 2003). As Detective Fackrell admitted in this case, "it's normal

for me" to run a "normal warrants check" on people with whom he speaks. JA 18.

Police officers in several other jurisdictions share Fackrell's practice of running routine warrant checks on the people they encounter. A police officer in Rockford, Illinois, for example, testified that "whenever he meets someone on the street, he runs a warrant check on that individual," regardless of whether he has any reason to believe that the individual might have an outstanding warrant. *People v. Mitchell*, 824 N.E.2d 642, 644 (Ill. App. Ct. 2005). In New York City, a police supervisor was recorded telling officers, on Halloween night, that if they encountered anyone with "bandanas around their necks, Freddy Krueger masks, I want them stopped, cuffed, alright, brought in here, run for warrants." *Floyd v. City of New York*, 283 F.R.D. 153, 166 n.68 (S.D.N.Y. 2012).

In Salina, Kansas, when the police stop vehicles, it is "'standard operating procedure' to obtain identification from every person in a vehicle and run a records check on the passengers," even where only the driver has been observed to violate the law. *State v. Jones*, 17 P.3d 359, 360 (Kan. 2001). In Arizona, a Forest Service officer explained that he was trained "to run warrant checks ... as a matter of routine practice whenever he encounters someone in the course of his work." *United States v. Tuttle*, 2015 WL 5736905, *2 (D. Ariz. 2015). In Elko, Nevada, a police officer testified that "it is his standard practice to verify the identification information of every person he encounters" by reciting that information "to police dispatch for verification and to check for out-

standing arrest warrants." *Torres v. State*, 341 P.3d 652, 654 (Nev. 2015), *pet. for cert. pending*, No. 15-5 (filed June 26, 2015).

The Justice Department's investigation of the Ferguson police likewise determined that "[m]any of the unlawful stops we found appear to have been driven, in part, by an officer's desire to check whether the subject had a municipal arrest warrant pending." *Investigation of the Ferguson Police Department* at 17. For example:

> An African-American man recounted to us an experience he had while sitting at a bus stop near Canfield Drive. According to the man, an FPD [Ferguson Police Department] patrol car abruptly pulled up in front of him. The officer inside, a patrol lieutenant, rolled down his window and addressed the man:
>
> Lieutenant: Get over here.
>
> Bus Patron: Me?
>
> Lieutenant: Get the f*** over here. Yeah, you.
>
> Bus Patron: Why? What did I do?
>
> Lieutenant: Give me your ID.
>
> Bus Patron: Why?
>
> Lieutenant: Stop being a smart ass and give me your ID.
>
> The lieutenant ran the man's name for warrants. Finding none, he returned the ID and said, "get the hell out of my face." These allegations are consistent with other, independent

> allegations of misconduct that we heard about this particular lieutenant, and reflect the routinely disrespectful treatment many African Americans say they have come to expect from the Ferguson police.

Id. at 17-18.

For additional examples of routine warrant checks without reasonable suspicion, see *Groves v. Croft*, 2011 WL 5509028, *7 (D. Mont. 2011) (involving an officer in Red Lodge, Montana, who conducted a routine suspicionless warrant check of a man admitted to a hospital); *State v. Winbush*, 152 Wash. App. 1020, *1 (Wash. Ct. App. 2009) (involving an officer in Snohomish County, Washington, who conducted a routine suspicionless warrant check where the police already knew that no crime had occurred); *United States v. Lopez*, 443 F.3d 1280, 1282 (10th Cir. 2006) (involving an officer in Denver who conducted a routine suspicionless warrant check of a man found standing next to his own car); *State v. Johnson*, 645 N.W.2d 505, 507 (Minn. 2002) (involving an officer in Brooklyn Park, Minnesota, who conducted a routine suspicionless warrant check of a passenger in the back seat of a car with a broken brake light); *State v. Jackson*, 542 N.W.2d 842, 843 (Iowa 1996) (involving an officer in Cedar Rapids, Iowa, who conducted a routine suspicionless warrant check of a man whose car overheated).

The primary reason the police conduct these routine suspicionless warrant checks appears to be that when the police make an arrest they can also conduct a search, of a person who would not otherwise

be searchable. "The discovery of an open warrant is likely not independently sufficient to incentivize such unconstitutional detentions," because "[t]he great majority of outstanding warrants are issued for trivial offenses. ... The utility of discovering an open warrant therefore is generally not derived from serving the warrant, but rather from conducting a search incident to arrest." Michael Kimberly, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 Yale L.J. 177, 181 n.22 (2008). When the police conduct stops without suspicion, they are aware that a substantial percentage of the people stopped will have outstanding arrest warrants. "If the check does not reveal a warrant, then the officer lets the individual go, having spent only a few minutes of time. If the warrants check does reveal an open warrant, the officer obtains legal authorization to conduct a search incident to arrest, and the unconstitutionality of the stop is rendered irrelevant." *Id.* at 179.[1]

This powerful incentive for the police to make suspicionless stops is exacerbated by the oft-condemned but still common practice of evaluating police officers based on how many arrests they make. *See* U.S. Department of Justice, *Implementing a Comprehensive Performance Management Approach in Community Policing Organizations: An Executive Guidebook* 28 (2015) (http://goo.gl/xByZUU) (noting that "many departments still rely heavily on numer-

---

[1] The enormous number of outstanding arrest warrants shows the error in Utah's contention (Pet. Br. 22) that police officers have no incentive to make unlawful stops in the hope of discovering an outstanding warrant.

ical data for evaluating the agency as a whole and for evaluating its personnel .... such as arrest rates"); *Final Report of the President's Task Force on 21st Century Policing* 26 (2015) (http://goo.gl/E8gW1W) (recommending that "[l]aw enforcement agencies and municipalities should refrain from practices requiring officers to issue a predetermined number of tickets, citations, arrests, or summonses"); Saki Knafo, *How Aggressive Policing Affects Police Officers Themselves*, The Atlantic, July 13, 2015 (http://goo.gl/c9KXwb) (providing evidence of the widespread use of arrest quotas in evaluating police officers). When promotion within the police force, or even the retention of one's job, depends on making a certain number of arrests, some officers succumb to the temptation to make unlawful stops in the hunt for outstanding arrest warrants.

There is nothing wrong with routine warrant checks where the police have "the reasonable suspicion ordinarily demanded to justify detaining an individual." *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015) (noting that the police often conduct a warrant check of the driver when they stop a car after they observe the driver committing a traffic violation); *see also Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 188 (2004) (holding that the Fourth Amendment does not prohibit the police from requesting a suspect's name, provided that the request comes "in the course of a valid *Terry* stop"); *Hayes v. Florida*, 470 U.S. 811, 816 (1985) (observing that a person may be stopped for identification only "if there are articulable facts supporting a reasonable suspicion that a person has committed a criminal of-

fense"). The problem is that the police in some jurisdictions routinely stop people to run warrant checks even when they lack reasonable suspicion, and even when they lack any reason to believe that the person being stopped has an outstanding arrest warrant.

Research suggests that the number of suspicionless stops is very large. A report published by the New York Attorney General found that 15.4% of stops made by the New York City Police Department lacked reasonable suspicion, and that in another 23.5% of stops it was impossible to determine whether the police had reasonable suspicion. *The New York City Police Department's "Stop and Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General* xiv (1999) (http://goo.gl/bRF1pJ). The same police department made at least 170,000 unlawful stops between 2004 and 2009, and another 400,000 stops that lacked sufficient documentation to assess their legality. *Floyd*, 283 F.R.D. at 167 & n.75. *See also* Jon B. Gould and Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 Criminology & Pub. Pol'y 315 (2004) (finding a similar pattern in a medium-sized city).

Research also suggests that the police stop members of minority groups at disproportionately high rates, even controlling for differences in crime rates among groups. *See* Sharon LaFraniere and Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. Times, Oct. 24, 2015 (http://nyti.ms/1kCouxU); Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of*

Racial Bias, 102 J. of the Am. Statistical Ass'n 813, 821-22 (2007); Ian Ayres and Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department* 27 (2008) (http://goo.gl/iHxKns).

Moreover, routine warrant checks often snare people who should not be arrested, because many of the outstanding arrest warrants in the FBI's database are erroneous. In *Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510, 1514 (2012), for example, the person named in the warrant had paid his fine in full, "but, for some unexplained reason, the warrant remained in a statewide computer database" and he was arrested on it again two years later. *Herring v. United States*, 555 U.S. 135, 137-38 (2009), likewise involved an arrest on a warrant that erroneously remained in the database despite having been recalled several months earlier. The same error occurred in *Arizona v. Evans*, 514 U.S. 1, 4-5 (1995).

These cases are just the tip of an enormous error-filled iceberg. In Los Angeles, for instance, the county sheriff announced he would create a task force to figure out why at least 1,480 people had been jailed in a five-year period due to such warrant errors, including one man who had been arrested and jailed for nine days in 1989 on a warrant meant for someone else, and who was then rearrested on the same warrant twenty years later and jailed for more than a month before the error was discovered. Robert Faturechi and Jack Leonard, *Errant Jailings Focus of Probe*, L.A. Times, Dec. 28, 2011 (http://goo.gl/kwI25H).

The Justice Department has found that states typically do not audit their warrant databases to remove errors. Bureau of Justice Statistics, *Improving Access to and Integrity of Criminal History Records* 13 (2005) (http://www.bjs.gov/content/pub/pdf/iaichr.pdf). Erroneous arrest warrants are often discovered only after the person named in the warrant has been wrongly arrested. As Justice O'Connor presciently warned, "it would *not* be reasonable for the police to rely ... on a recordkeeping system ... that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests." *Evans*, 514 U.S. at 17 (O'Connor, J., concurring).

B. Facts and proceedings below

Detective Doug Fackrell detained respondent Edward Strieff after Strieff left a house that Fackrell was watching. Pet. App. 4. Fackrell knew nothing about Strieff. He had never seen Strieff before. JA 20. He did not know who Strieff was. JA 20. He had not seen Strieff enter the house. Pet. App. 4. He did not know how long Strieff had been inside. Pet. App. 5. He did not know whether Strieff lived in the house. JA 20. As the court below found, Fackrell "knew nothing of him other than that he left the house." Pet. App. 5.

Fackrell also knew very little about the house. He had been watching the house "off and on for a week or so" for a total of approximately three hours, JA 16, after an anonymous caller left a message on a drug tip line saying "they believed there was narcotics activity at the house and they described some short stay traffic at the house." JA 15. Fackrell did not

know who owned the house, or who lived in it, or whether any crimes took place inside.

After Fackrell observed "not terribly frequent" visitors, JA 16, he decided he would detain the next person he saw leaving the house. JA 17. That person turned out to be Strieff. As Fackrell testified, he detained Strieff because "[h]e was coming out of the house that I had been watching and I decided that I'd like to ask somebody if I could find out what was going on [in] the house." JA 17. Fackrell admitted that he "had no reason to stop him other than that he had left that house." JA 20. Fackrell also admitted that Strieff had done nothing to arouse any "suspicion that he was committing a crime other than him leaving the house." JA 21. Utah has conceded throughout this case that Fackrell did not have reasonable articulable suspicion to detain Strieff. Pet. App. 5.

Fackrell detained Strieff about a block from the house. Pet. App. 4; JA 18. He identified himself as a police officer and told Strieff that "I had been watching the house and that I believed there might be drug activity there and asked him if he would tell me what he was doing there." JA 18. Fackrell could not remember Strieff's response. JA 23.

Fackrell asked for Strieff's identification because he wanted "to know who I'm talking to." JA 18. This was Fackrell's standard practice when he stopped someone. As Fackrell explained, "of course it's normal for me to want to know who I'm talking to so I told him that, you know, if he had some ID if I could please see it." JA 18. Fackrell took Strieff's identifi-

cation and asked the dispatcher to check for any outstanding arrest warrants. Pet. App. 5. This was also Fackrell's standard practice when he stopped someone. He testified: "I had dispatch run a warrants check, normal warrants check." JA 18. The dispatcher found that Strieff had a minor traffic warrant. Pet. App. 5.

Fackrell arrested Strieff on the warrant and conducted a search, during which he found methamphetamine and drug paraphernalia in Strieff's pockets. Pet. App. 5. Utah charged Strieff with possession of methamphetamine and drug paraphernalia. Pet. App. 5. Strieff moved to suppress the evidence found in his pockets, on the ground that the evidence was the fruit of an unconstitutional detention. Pet. App. 5. The state district court determined that although the stop was unconstitutional, Fackrell's discovery of the warrant was an "intervening circumstance" that rendered suppression an "inappropriate remedy." Pet. App. 6.

Strieff entered a conditional guilty plea to misdemeanor attempted possession of a controlled substance and paraphernalia. Pet. App. 6. He reserved the right to appeal the order denying his motion to suppress. Pet. App. 6.

The Utah Court of Appeals affirmed by a vote of 2-1. Pet. App. 37-98. The majority held that the evidence was admissible under the "attenuation" exception to the exclusionary rule recognized in *Brown v. Illinois*, 422 U.S. 590 (1975). Pet. App. 49-84. Judge Thorne, dissenting, concluded that the evidence should have been excluded. Pet. App. 84-98.

The Utah Supreme Court unanimously reversed. Pet App. 1-36.

The court explained that this Court has established "a three-factor test to guide the attenuation inquiry. The three factors are: (1) the 'temporal proximity' of the unlawful detention and the discovery of incriminating evidence, (2) the presence of 'intervening circumstances,' and (3) the 'purpose and flagrancy' of the official misconduct." Pet. App. 18 (quoting *Brown*, 422 U.S. at 603-04).

The court concluded that the discovery of an arrest warrant during a routine warrant check is not an intervening circumstance. Under the attenuation exception, the court noted, the "prototypical intervening circumstance involves a voluntary act by the defendant, such as a confession or consent to search given after illegal police action." Pet. App. 18-19. This factor "cannot easily be extended to the discovery of an outstanding warrant," the court continued, because "[t]he discovery of an outstanding warrant is hardly an independent act or occurrence" that could break the causal chain between the police misconduct and the seizure of the evidence. Pet. App. 29. Rather, the discovery of a warrant, as a result of a routine warrant check, "is part of the natural, ordinary course of events arising out of an arrest or detention. And in that sense, even if the warrant could be thought of as somehow intervening, it would hardly be unforeseeable." Pet. App. 29. The court concluded that the discovery of "an outstanding warrant does not qualify" as an intervening circumstance, because "it is not an independent act that is

sufficiently removed from the primary illegality to qualify as *intervening*." Pet. App. 29.

The Utah Supreme Court added that the other two "attenuation factors articulated by the Supreme Court also seem to cut in the same direction." Pet. App. 29. The court accordingly determined that the evidence seized from Strieff was inadmissible under the attenuation exception. Pet. App. 34.

SUMMARY OF ARGUMENT

A. Where the police make an unlawful stop and run a routine warrant check, the discovery of a warrant does not attenuate the causal connection between the unlawful stop and the discovery of evidence, because the discovery of a warrant is the immediate and foreseeable consequence of the stop and the warrant check. The physical evidence found in Edward Strieff's pockets was thus not admissible under the attenuation exception to the exclusionary rule.

1. The exclusionary rule applies where the rule's value in deterring future Fourth Amendment violations exceeds its cost, but the Court does not conduct this cost/benefit analysis from scratch in every case. Rather, the Court's exclusionary rule jurisprudence already incorporates the balance between cost and benefit, by defining certain well-established exceptions to the exclusionary rule, exceptions that have well-established limits to their application.

Evidence is admissible under the attenuation exception where, although a constitutional violation is the but-for cause of the discovery of the evidence, the

taint of the violation has dissipated by the time the police discover the evidence. The attenuation exception uses the tort law concept of proximate cause to ensure that the exclusionary rule does not apply to remote and unforeseeable consequences of constitutional violations, because in such cases excluding the evidence would not deter the police from violating the Constitution.

Where an unlawful stop includes a routine warrant check, the discovery of a warrant is a direct, foreseeable consequence of the unlawful stop. The discovery of the warrant thus does not dissipate the taint of the constitutional violation. All three of the factors the Court has identified as relevant to the attenuation inquiry point strongly against attenuation. First, the constitutional violation and the ensuing search are temporally proximate; the search takes place *during* the unlawful stop. Second, there are no intervening circumstances. Under the Court's attenuation jurisprudence, an intervening circumstance must be an unforeseeable event unrelated to the officer's unlawful conduct. The discovery of a warrant, by contrast, is the foreseeable—indeed, the intended—result of an unlawful stop that includes a routine warrant check. Third, the police misconduct in this case was flagrant; it was an obviously unconstitutional stop made for investigatory purposes. The discovery of evidence in this case was the direct and foreseeable result of Fackrell's decision to detain Strieff and run a warrant check without reasonable suspicion. The evidence seized from Strieff is thus not admissible under the attenuation exception.

2. The Court has also used the word "attenuation" where suppression would not serve the interest protected by the Fourth Amendment, but there was no attenuation in this sense either. Here, the interest protected by the Fourth Amendment—the interest in not being wrongfully detained by the police—is precisely the one that is served by suppression. Indeed, in the cases in which the Court has found this kind of attenuation, the Court has been careful to distinguish cases (like the present case) involving the fruits of unlawful warrantless searches. In this case the police committed a straightforward *Terry* violation, for which suppression has long been the standard remedy.

3. The United States' argument concerning evidence of a defendant's identity is misplaced in this case. The evidence at issue is not evidence of Edward Strieff's identity or evidence solely derived therefrom, but rather the physical evidence found in Strieff's pockets while he was being unlawfully detained. The United States' argument is incorrect in any event. Evidence of a defendant's identity *is* suppressible if the police obtain that evidence by violating the Fourth Amendment.

B. The exclusionary rule is necessary to deter the police from making unconstitutional stops to run routine warrant checks. The exclusionary rule's deterrence value is at its highest in circumstances where, in the rule's absence, the police would be very likely to engage deliberately or recklessly in a pattern of Fourth Amendment violations. This is such a circumstance. In some jurisdictions, the police run routine warrant checks on the people they encoun-

ter, regardless of whether the police have reasonable suspicion of criminal activity, and regardless of whether they have any reason to believe that the person being stopped has any outstanding warrants.

For this reason, many state courts, which have a broad view of how the state's police officers conduct themselves, have recognized that the only realistic way to deter the police from conducting warrant checks without reasonable suspicion is to exclude the evidence so obtained. The theoretical deterrents posited by the United States—civil suits, investigation by the Justice Department, and community hostility—are evidently not working.

In the leading lower court case taking the opposing view, the Seventh Circuit was concerned that applying the exclusionary rule would allow the defendant to go free despite the arrest warrant. But this concern is unfounded, because the defendant will not go free. The police have every right to make a lawful arrest of a person named in an arrest warrant. The exclusionary rule is necessary to deter unlawful stops, but in this situation the defendant can still be prosecuted for the offense that gave rise to the warrant.

Utah and the United States err in contending that the exclusionary rule is needed only to deter a subset of unlawful stops the state refers to as "dragnet-type" stops. No doubt, if the police were to cordon off a neighborhood and run dragnet-type warrant searches on every person within the perimeter, the police would be committing a wholesale violation of the Fourth Amendment, and the exclusionary rule

would be an appropriate deterrent to such behavior. But the Fourth Amendment violation would be just as wholesale, and the exclusionary rule would be just as appropriate a deterrent, if the unlawful warrant checks were being run by a single police officer who simply walks around a neighborhood and runs warrant checks without reasonable suspicion on the people he happens to encounter. There is nothing special about "dragnets" that justifies treating them differently from any other widespread pattern of violations.

Indeed, the exclusionary rule's deterrent value is at its greatest when brought to bear on the individual officer's judgment in an individual case. An officer observing a person in circumstances falling short of reasonable suspicion must choose between gathering more information, which may give him reasonable suspicion to make a *Terry* stop, or detaining the person unlawfully, in the hope that the person will turn out to have an outstanding arrest warrant. Officers make this choice every day, including in cities where the police know that a significant percentage of the residents have outstanding warrants. This is exactly why we have the exclusionary rule.

ARGUMENT

The evidence seized from Edward Strieff is inadmissible under the "attenuation" exception to the exclusionary rule, because it was obtained as a direct consequence of a patently unconstitutional detention.

The evidence seized from Edward Strieff while he was being unlawfully detained is inadmissible under the "attenuation" exception to the exclusionary rule. Utah has conceded throughout this litigation that the detention of Strieff violated the Fourth Amendment, because the police lacked reasonable suspicion that Strieff had committed any crime. Under the Court's extensive and detailed attenuation jurisprudence, the discovery of an outstanding arrest warrant, during a routine warrant check, is not an intervening circumstance breaking the causal chain between the unlawful stop and the search. Rather, the discovery of the warrant is an immediate and foreseeable consequence of the stop and the warrant check. The interest protected by the Fourth Amendment—the interest in not being wrongfully detained by the police—is precisely the one that is served by suppression.

The purpose of the exclusionary rule is to deter future police misconduct. Here, the deterrence value of exclusion is at its highest. The police have a powerful incentive to make unlawful stops to conduct routine warrant checks, in order to arrest people they could not otherwise arrest, and in order to search people they could not otherwise search. Because of

this strong incentive, the police in some jurisdictions routinely conduct warrant checks on the people they encounter, regardless of whether the police have any reason to believe a person has committed a crime or has an outstanding warrant. The exclusionary rule is the only remedy capable of deterring this pattern of police misconduct, a pattern that is sure to become pervasive if the Court finds the exclusionary rule inapplicable.

A. Where the police make an unlawful stop and run a routine warrant check, the discovery of a warrant does not attenuate the causal connection between the unlawful stop and the ensuing search.

The exclusionary rule applies where the rule's value in deterring future Fourth Amendment violations exceeds its cost, *Davis v. United States*, 131 S. Ct. 2419, 2426-27 (2011), but the Court does not conduct this cost/benefit analysis from scratch in every case. For most cases, including this one, the Court's exclusionary rule jurisprudence already incorporates the balance between the rule's deterrent value and its cost, by defining certain well-established exceptions to the rule, exceptions that have well-established limits to their applicability. *United States v. Leon*, 468 U.S. 897, 910-11 (1984) (observing that the attenuation exception incorporates the balance between the exclusionary rule's benefits and costs); *Nix v. Williams*, 467 U.S. 431, 442-44 (1984) (same for the inevitable discovery exception); *Murray v. United States*, 487 U.S. 533, 537-

40 (1988) (same for the independent source exception).

Evidence is admissible under the attenuation exception where, although "a constitutional violation was a 'but-for' cause of obtaining evidence," the causal connection is "too attenuated to justify exclusion." *Hudson v. Michigan*, 547 U.S. 586, 592 (2006). As Justice Frankfurter observed in his opinion for the Court in *Nardone v. United States*, 308 U.S. 338, 341 (1939), while the government should not gain from the wrongdoing of its officers, "[a]s a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."

The attenuation exception uses the tort law concept of proximate cause to ensure that the exclusionary rule does not apply to remote and unforeseeable consequences of constitutional violations.[2] *United States v. Smith*, 155 F.3d 1051, 1060 (9th Cir. 1998) (describing the attenuation exception as "akin to a proximate causation analysis"); Albert W. Alschuler, Herring v. United States: *A Minnow or a Shark?*, 7 Ohio St. J. Crim. L. 463, 478-79 n.75 (2009) ("The exclusionary rule suppresses evidence only when a constitutional violation is the proximate cause of the government's receipt of this evidence.") Where the discovery of evidence is not a direct, foreseeable re-

---

[2] Although Utah errs in suggesting (Pet. Br. 37) that the attenuation exception is unrelated to proximate cause, Utah's error has little practical importance, because Utah agrees that the purpose of the attenuation exception is to reserve the exclusionary rule for cases in which the rule will have a deterrent effect by excluding evidence obtained as a direct and foreseeable result of police misconduct.

sult of police misconduct, excluding the evidence would not deter the police from committing the misconduct, so "the deterrent effect of the exclusionary rule no longer justifies its cost." *Leon*, 468 U.S. at 911 (citation and internal quotation marks omitted). By contrast, where the discovery of evidence *is* a direct, foreseeable consequence of the police misconduct, excluding the evidence *will* deter the police from committing similar misconduct in the future.

The only evidence at issue in this case is the physical evidence found in Strieff's pockets during the search that Fackrell conducted while unlawfully detaining him. Strieff has never claimed that the arrest was unlawful or that the arrest warrant itself is suppressible. As the court below correctly observed, "[n]o one is contesting—or even could reasonably contest—the arrest on the outstanding warrant." Pet. App. 32 n.12. Both sides agree that Strieff's person is not suppressible. Both sides agree that Strieff was rightly punished for the traffic violation for which the warrant was issued. The only dispute in this case is whether the discovery of evidence in Strieff's pockets while Fackrell was unlawfully detaining him was so attenuated from Fackrell's constitutional violation that the taint of the violation had dissipated.

1. The discovery of the warrant in these circumstances is an immediate and foreseeable consequence of the stop and the warrant check.

The "burden of persuasion [is] on the State" to show that evidence is admissible under the attenua-

tion exception. *Kaupp v. Texas*, 538 U.S. 626, 633 (2003). The Court has identified three factors that are relevant to this attenuation inquiry: "the temporal proximity" of the stop and the discovery of the evidence, "the presence of intervening circumstances," and "the purpose and flagrancy of the official misconduct." *Id.* (citation and internal quotation marks omitted). In this case, all three factors point strongly against attenuation.[3]

1. Temporal proximity. The first factor is the "temporal proximity" of the unlawful stop and the discovery of the evidence. *Brown v. Illinois*, 422 U.S. 590, 603 (1975). The shorter the time between the two, the more likely it is that the taint of the Fourth Amendment violation has not dissipated—i.e., the more likely it is that the police misconduct was the proximate cause of the discovery of the evidence.

Where only a short time elapses between the wrongful detention of the defendant and the officer's discovery of the evidence, the Court has thus found no attenuation. *See, e.g.*, *Kaupp*, 538 U.S. at 633 (finding no attenuation where police obtained defendant's confession only 10 to 15 minutes after unlawfully arresting him); *Taylor v. Alabama*, 457 U.S. 687, 691 (1982) (finding no attenuation where

---

[3] Utah (Pet. Br. 15) and the United States (U.S. Br. 13) urge the Court to pay no mind to these factors, on the theory that they are relevant only to whether a confession, but not other evidence, is sufficiently attenuated from an unconstitutional detention. This theory is wrong. As we explain in our discussion of each factor, each captures part of the proximate cause inquiry and is thus relevant to the ultimate question of whether suppressing the evidence will deter future police misconduct.

"[p]etitioner was arrested without probable cause in the hope that something might turn up, and he confessed shortly thereafter"); *Dunaway v. New York*, 442 U.S. 200, 203 & n.2, 218 (1979) (finding no attenuation where defendant confessed within an hour after wrongful arrest); *Brown*, 422 U.S. at 604 (finding no attenuation where defendant's confession "was separated from his illegal arrest by less than two hours"); *Wong Sun v. United States*, 371 U.S. 471, 486 (1963) (finding no attenuation where defendant confessed shortly after being unlawfully arrested).

By contrast, where a long time elapses between the wrongful police conduct and the discovery of the evidence, the Court has found attenuation. *United States v. Ceccolini*, 435 U.S. 268, 272, 279 (1978) (finding attenuation where several months elapsed between the police misconduct and the obtaining of the evidence sought to be suppressed); *Wong Sun*, 371 U.S. at 491 (finding attenuation where several days elapsed between the wrongful arrest and the defendant's statement).

This "temporal proximity" factor weighs heavily against attenuation in this case. Where the police make a wrongful stop, run a warrant check, and conduct a search, the entire episode is one continuous transaction. The search takes place *during* the unlawful detention. In this case, the amount of time that passed between the wrongful stop and the search was much less than the hour or two the Court has found too short for attenuation in prior cases.

2. Intervening circumstances. The second factor the Court has found relevant to the attenuation inquiry is "the presence of intervening circumstances." *Brown*, 422 U.S. at 603-04. This factor also points strongly against attenuation, because in this situation, there are no intervening circumstances. The discovery of a warrant is an intended and foreseeable consequence of a warrant check.

"Intervening circumstance" is a term borrowed from proximate cause analysis in tort law. *See, e.g.*, *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1876) ("Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"). To relieve a tort defendant of liability, the intervening circumstance must be *unforeseeable*. W. Page Keeton et al., eds., *Prosser and Keeton on the Law of Torts* 303 (5th ed. 1984) ("Obviously the defendant cannot be relieved from liability by the fact that the risk, or a substantial and important part of the risk, to which the defendant has subjected the plaintiff has indeed come to pass. Foreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence."); 3 Stuart M. Speiser et al., *The American Law of Torts* 105 (2008) ("if the original negligent actor reasonably could have anticipated or foreseen the intervening act and its consequences, then the intervening act will not relieve the original actor from liability"); Dan B. Dobbs et al., *The Law of Torts* § 198 (2d ed., Westlaw) ("In these intervening cause cases, courts [ask] whether the intervening

cause itself was foreseeable."). The causal chain is not broken by the "intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct." *Restatement (Second) of Torts* § 443.

The Court's attenuation cases have likewise focused on whether the alleged intervening circumstance was an unforeseeable event unrelated to the officer's unlawful conduct (in which case the Court has found attenuation), or whether the alleged intervening circumstance was itself foreseeably caused by the officer's unlawful conduct (in which case the Court has found no attenuation). The paradigmatic intervening circumstance supporting a finding of attenuation is where the defendant spontaneously confesses to the crime.[4] *See Rawlings v. Kentucky*, 448 U.S. 98, 108 (1980) (finding attenuation where "petitioner's admissions were apparently spontaneous reactions"); *Ceccolini*, 435 U.S. at 276 ("Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition."); *Wong Sun*, 371 U.S. at 491 (finding attenuation where defendant voluntarily returned to the police station to make a statement).

---

[4] The Utah Supreme Court took the view that the defendant's confession is the *only* intervening circumstance that can attenuate the causal connection between a wrongful stop and the subsequent discovery of evidence. Pet. App. 27-29. We think this view is too narrow. Intervening circumstances need not be confessions, but they must be events that are not foreseeable consequences of the wrongful stop.

By contrast, the Court has found no intervening circumstance, and thus no attenuation, where the defendant's statement was a foreseeable consequence of the police misconduct. *See Kaupp*, 538 U.S. at 633 (finding no attenuation where the defendant confessed during interrogation that took place shortly after his wrongful arrest); *Taylor*, 457 U.S. at 691 (finding no attenuation where the defendant confessed shortly after wrongful arrest "without any meaningful intervening event"); *Dunaway*, 442 U.S. at 218 (same); *Brown*, 422 U.S. at 604 (same).

The Court's focus on the foreseeability of the alleged intervening circumstance ensures that the exclusionary rule applies only where it will deter police misconduct, because an officer, like any other person, can be deterred only with respect to the foreseeable consequences of his actions. Here again, the attenuation exception to the exclusionary rule is closely analogous to proximate cause analysis in tort law, which likewise deters wrongdoing by holding tortfeasors responsible only for the foreseeable consequences of their negligence.

In this case, where the police made an unlawful stop and ran a routine warrant check, the discovery of an outstanding arrest warrant was of course the intended and foreseeable consequence. It was thus not an intervening circumstance that attenuated the causal connection between the unlawful stop and the search.

An intervening circumstance would be an event that is *not* a foreseeable consequence of the unlawful stop. For example, if while an officer is unlawfully

detaining a person, a bystander points to the person and declares "that man stole my wallet five minutes ago," the bystander's declaration could be an intervening circumstance breaking the causal connection between the unlawful stop and a subsequent search of the person for the wallet. If, in the midst of an unlawful detention, the person being detained commits a new crime such as striking the officer, the new crime would be an intervening circumstance. If a wrongfully detained person is released and then returns to the police station the next week to confess to a crime, his confession would be an intervening circumstance. The bystander's declaration, the new crime, and the spontaneous confession are intervening circumstances because they are not foreseeable consequences of the unlawful stop. But the discovery of an arrest warrant is exactly what one would expect from running a warrant check. It cannot be an intervening circumstance.

The discovery of an arrest warrant *could* be an intervening circumstance that breaks the causal chain between the unlawful stop and the search, but only if the discovery of the warrant is not a foreseeable consequence of the stop. For instance, if while one officer is unlawfully detaining a person, a second officer unexpectedly drives up and announces "I recognize that man as someone named in an arrest warrant," the second officer's announcement would be an intervening circumstance. If a wrongfully detained person spontaneously admits to having an outstanding arrest warrant, his admission could be an intervening circumstance. The second officer's announcement and the spontaneous admission are in-

tervening circumstances because they are not foreseeable consequences of the unlawful stop. By contrast, the discovery of an arrest warrant during a routine warrant check *is* a foreseeable consequence of the unlawful stop. For that reason, it cannot be an intervening circumstance.[5]

3. Purpose and flagrancy of police misconduct. The third factor the Court has found relevant to the attenuation inquiry is "the purpose and flagrancy of the official misconduct." *Brown*, 422 U.S. at 604. Under this factor the Court has considered the officer's *purpose* in violating the Fourth Amendment, as well as the *obviousness* of the constitutional violation. *Cf. Herring v. United States*, 555 U.S. 135, 144 (2009) ("To trigger the exclusionary rule, police misconduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."). This factor points strongly against attenuation as well. The unlawful stop in this case was for an impermissible investigatory purpose, and it was an obviously unconstitutional detention.

---

[5] Amici Michigan et al. err in suggesting that the discovery of a warrant during a routine warrant check is a matter over which the "police officer lacks control." Michigan et al. Br. 10. The police have complete control over the decision to make an unlawful stop and run a warrant check. Amici argue that the police lack control over whether a warrant exists in the first place, *id.* at 10-11, but the relevant issue is whether the police control the decision to make the unlawful stop (and can thus be deterred from making the unlawful stop), not whether the police have control over the existence of the warrant.

Where the police violate the Fourth Amendment for investigatory purposes, "in the hope that something would turn up," *Taylor*, 457 U.S. at 691, the Court has refused to find attenuation. *See Kaupp*, 538 U.S. at 633 (finding no attenuation where the defendant was arrested in order to be questioned); *Taylor*, 457 U.S. at 693 (finding no attenuation where the police "involuntarily transported petitioner to the station for interrogation"); *Dunaway*, 442 U.S. at 218 (finding no attenuation where the defendant was "seized without probable cause in the hope that something might turn up"); *Brown*, 422 U.S. at 605 (finding no attenuation where the police acknowledged "that the purpose of their action was 'for investigation' or for 'questioning'").

By contrast, the Court has found attenuation where the police misconduct was not for investigatory purposes. *See Rawlings*, 448 U.S. at 109-110 (finding attenuation where the police detained the defendant, not for questioning, but rather "to avoid the asportation or destruction of the marihuana they thought was present"); *Ceccolini*, 435 U.S. at 279-80 (finding attenuation where there was "not the slightest evidence to suggest that [the officer] entered the shop or picked up the envelope with the intent of finding tangible evidence").

Here, by his own admission, Detective Fackrell deliberately stopped Strieff so Fackrell "could find out what was going on [in] the house." Pet. App. 4-5. After making the unlawful stop, Fackrell asked Strieff to "tell me what he was doing there." JA 18. This was a deliberate stop for investigatory purposes, in the hope that something would turn up. The

warrant check was made with the same investigatory purpose—to investigate whether Strieff had an outstanding warrant. JA 18-19. This was precisely the sort of police misconduct for which the Court has never found attenuation.

Police misconduct is "flagrant" under this standard where the police detain a person in a patently unconstitutional manner. *See Kaupp*, 538 U.S. at 632 (finding flagrancy where "the State does not even claim that the sheriff's department had probable cause to detain him"); *Taylor*, 457 U.S. at 691 (finding flagrancy where "[p]etitioner was arrested without probable cause"); *Dunaway*, 442 U.S. at 218 (finding flagrancy where "[p]etitioner was also admittedly seized without probable cause"); *Brown*, 422 U.S. at 605 (finding flagrancy where "[t]he impropriety of the arrest was obvious"). *Cf. Herring*, 555 U.S. at 143 (noting that "the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional").

When Fackrell stopped Strieff, it was glaringly obvious that Fackrell lacked reasonable articulable suspicion that Strieff was involved in criminal activity. A stop such as the one in this case, "involving a brief encounter between a citizen and a police officer on a public street, is governed by the analysis we first applied in *Terry*." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (referring to *Terry v. Ohio*, 392 U.S. 1 (1968)). The *Terry* standard applies where, as here, the police detain a person "for the purpose of requiring him to identify himself." *Brown v. Texas*, 443 U.S. 47, 50 (1979). The Fourth Amendment permits such stops only where "a law enforcement officer has

'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

The suspicion must be *particularized*—that is, it must be suspicion that the individual person being stopped is engaged in criminal activity. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). "[M]ere propinquity to others independently suspected of criminal activity" is not enough. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). Even if a "person happens to be on premises" where the police suspect drugs are present, the police can only stop the person if they have "suspicion directed at the person" himself. *Id.* at 94.

And the suspicion must be *objectively reasonable*—that is, it must amount to suspicion "viewed from the standpoint of an objectively reasonable police officer." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). It must be more than a "hunch" that the person being stopped is involved in criminal activity. *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

Measured by this standard, any reasonable police officer would have recognized instantly that Detective Fackrell was making an unlawful stop. By Fackrell's own admission, he decided to stop the first person he saw leaving the house he was watching, regardless of who that person turned out to be. Pet. App. 4-5; JA 17, 20-21. Fackrell had no idea who Strieff was or what Strieff had been doing. Fackrell admitted that he "had no reason to stop him other

than that he had left that house." JA 20-21. This stop was patently unconstitutional. As in *Brown*, "[t]he impropriety of the [stop] was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was 'for investigation' or for 'questioning.'" *Brown*, 422 U.S. at 605.

Moreover, the only reason Fackrell was even watching the house was that the police had received an anonymous tip from a caller who "believed there was narcotics activity at the house" and "described some short stay traffic at the house." JA 15. Officers should know that reasonable suspicion does not arise from "the bare report of an unknown, unaccountable informant who neither explained how he knew about the [alleged criminal activity] nor supplied any basis for believing he had inside information about [the person being stopped]." *Florida v. J.L.*, 529 U.S. 266, 271 (2000).

Fackrell's conduct during the unlawful stop made it even more flagrant. After detaining Strieff and asking him what was going on in the house, Fackrell could not even remember Strieff's answer, JA 23, which indicates that Strieff's answer did not give Fackrell any reason to suspect that Strieff was involved in crime. At that point, any reasonable officer would have recognized that the encounter should have been over. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1616 (2015). Yet Fackrell continued to prolong the detention by asking for Strieff's identification and running the warrant check.

Utah errs in suggesting (Pet. Br. 31) that Fackrell "reasonably misjudge[d]" whether the Constitution permitted him to detain Strieff. To the contrary, Fackrell made an elementary error. Few rules governing the police are more fundamental and more well-known than the rule that the police may not detain someone without reasonable suspicion that the person being stopped is involved in crime. "Responsible law-enforcement officers [who] take care to learn what is required of them under Fourth Amendment precedent," *Davis*, 131 S. Ct. at 2429 (internal quotation marks omitted), know that they cannot detain people simply to find out what is going on inside a house. Responsible officers know that they need reasonable suspicion that the person they are stopping has committed a crime. *See, e.g.*, *Brown*, 443 U.S. at 50 ("When the officers detained appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment."); *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

The trial court's legal conclusion that the stop was "not a flagrant violation of the Fourth Amendment," Pet. App. 102, is simply incorrect. The United States errs in implying (by using the verb "found," U.S. Br. 3) that this was a finding of fact. It was of course a conclusion of law, and for that reason the Utah Supreme Court properly gave it no deference. Pet. App. 8.

Utah is also mistaken in suggesting (Pet. Br. 24) that Fackrell could not have been deterred by the exclusionary rule because he was acting in "good

faith." Good faith is an *objective* standard, not a subjective one. *Davis*, 131 S. Ct. at 2427. The question is not whether the officer was pure of heart, but rather "whether a reasonably well trained officer would have known that the [stop] was illegal." *Leon*, 468 U.S. at 922 n.23. Any reasonably well trained officer would know that the stop in this case was utterly lacking in reasonable suspicion.

Fackrell, in any event, did not even claim to have subjective good faith. He testified, not that he erroneously believed he had reasonable suspicion to detain Strieff, but rather that he detained Strieff in order to "find out what was going on [in] the house." Pet. App. 4-5. As Fackrell conceded, he "had no reason to stop him other than that he had left that house." JA 20.

Moreover, while an officer's objective good faith may entitle him to rely on a facially valid warrant, *Leon*, *id.* at 914-17, on a statute, *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987), or on a court opinion, *Davis*, 131 S. Ct. at 2429, Fackrell was not relying on anything of the kind. He simply conducted an illegal stop. Good faith is not an exception to the requirement of reasonable suspicion. To conduct a *Terry* stop, an officer must actually have particularized, objectively reasonable suspicion. It is not enough that he merely has a good faith belief that he has reasonable suspicion.

All three of the factors the Court has identified as relevant to the attenuation inquiry thus point strongly against attenuation. First, the search was contemporaneous with the unlawful detention, so

the two were as temporally proximate as they could be. Second, there was no intervening circumstance, because Fackrell's discovery of the warrant was a foreseeable (indeed, an intended) consequence of the warrant check. Third, Fackrell's misconduct was flagrant—it was an obviously unconstitutional stop made for investigatory purposes. The evidence obtained from Strieff as a result of the unlawful stop is therefore not admissible under the attenuation exception to the exclusionary rule.

This outcome makes perfect sense in light of the purpose of the attenuation exception. The exception ensures that the exclusionary rule is not applied where the discovery of evidence is a remote or unforeseeable consequence of police misconduct, because in that situation excluding the evidence would not deter the police from violating the Constitution. Here, by contrast, the discovery of evidence was hardly a remote or unforeseeable consequence of Fackrell's unlawful stop. Rather, it was a direct and foreseeable consequence of the unlawful stop. Applying the exclusionary rule will thus deter officers like Fackrell from committing similar constitutional violations in the future.

2. The interest protected by the Fourth Amendment—the interest in not being wrongfully detained by the police—is precisely the one that is served by suppression.

The Court has used the word "attenuation" in a second, newer sense as well, where "even given a direct causal connection, the interest protected by the

constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Hudson*, 547 U.S. at 593. There was no attenuation in this sense either, because here the interest protected by the Fourth Amendment—the interest in not being wrongfully detained by the police—is precisely the one that is served by suppression. The United States errs (U.S. Br. 15-18) in suggesting otherwise.

The Fourth Amendment protects the "inestimable right of personal security," which "belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study." *Terry*, 392 U.S. at 8-9. "[A]s this Court has always recognized, '[n]o right is held more sacred.'" *Id.* at 9 (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). "The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones v. United States*, 357 U.S. 493, 498 (1958). This freedom from the intrusions of police officers is "one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." *Johnson v. United States*, 333 U.S. 10, 17 (1948).

The purpose of the exclusionary rule is "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). The interest that is served by suppressing evidence obtained during an unlawful detention is to deter the police from conducting similar

unlawful detentions in the future. *See Davis*, 131 S. Ct. at 2426. Here, that is exactly what suppression will accomplish. Police officers in Fackrell's shoes will no longer have the incentive to detain and run routine warrant checks on the people they encounter without reasonable suspicion, because they will know that the fruits of an ensuing search will be inadmissible.

In the cases where the Court has found "attenuation" in this second, newer sense, the constitutional guarantees that were involved protected very different interests, interests other than that of not being wrongfully detained by the police. These were interests that would not have been served by suppression.

Hudson involved a violation of the common law knock-and-announce rule. *Hudson*, 547 U.S. at 589. The Court explained that the interests protected by the knock-and-announce rule—assuring the officers' safety, preventing the destruction of property, and allowing residents to preserve their dignity by getting dressed before the police enter, *id.* at 594—"are quite different" from the interests protected by the Fourth Amendment's prohibition of unlawful warrantless searches, in that they "do not include the shielding of potential evidence from the government's eyes." *Id.* at 593. Indeed, the Court was careful to distinguish *Hudson* from cases—like the present case—"excluding the fruits of unlawful warrantless searches," because in such cases the interest protected by the constitutional guarantee *is* served by suppression. *Id.*

Likewise, *New York v. Harris*, 495 U.S. 14, 16 (1990), involved a violation of the rule prohibiting the police from entering a suspect's home to make a routine warrantless arrest. The Court explained that this rule "was designed to protect the physical integrity of the home," not to prevent the police from arresting the defendant or taking his confession. *Id.* at 17. The Court accordingly concluded that "suppressing the statement taken outside the house would not serve the purpose of the rule that made Harris' in-house arrest illegal." *Id.* at 20. The Court carefully distinguished *Harris* from cases—like the present case—involving "the familiar proposition that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality." *Id.* at 19. In such cases, suppression *does* serve the interest protected by the Fourth Amendment, the interest in not being detained by the police without reasonable suspicion.

Unlike in *Hudson* and *Harris*, the interest protected by the Fourth Amendment in this case is precisely the interest that is served by suppression. It is the interest in not being detained by the police without reasonable suspicion. The discovery of the evidence in this case was thus not attenuated from the unlawful stop in the *Hudson* sense of "attenuation."

In arguing otherwise, the United States conflates the unlawful stop with the arrest on the warrant. The present case challenges the former, not the latter. As the United States concedes (U.S. Br. 16), "[a]pplication of the exclusionary rule ... aligns suppression with the basic purpose of the *Terry* doctrine:

to prevent the police from stopping and frisking citizens based only on unsupported hunches." *Terry* is designed to prevent detentions without reasonable suspicion, such as the unlawful stop that took place in this case. Suppression for *Terry* violations is the standard way of enforcing the *Terry* doctrine, in this case just like in any other.

The United States makes a very poor analogy (U.S. Br. 17 n.3) to a negligent driver whose passengers are harmed by a cause unrelated to the driver's negligence, such as an airplane falling from the sky. A much better analogy would be to a negligent driver whose passengers are injured in a crash, the heightened risk of which was created by the driver's own negligence. By running warrant checks on the people they encounter, regardless of reasonable suspicion, the police deliberately heighten their chances of finding an arrest warrant and making an arrest.

The United States also errs (U.S. Br. 18-20) in claiming support from *Segura v. United States*, 468 U.S. 796 (1984), and *Johnson v. Louisiana*, 406 U.S. 356 (1972). In *Segura*, "not even the threshold 'but for' requirement was met," because "[t]he illegal entry into petitioners' apartment did not contribute in any way to discovery of the evidence seized under the warrant." *Segura*, 468 U.S. at 815. To the extent *Segura* nevertheless discussed attenuation, it was only to reject the contention that the causal chain could have included a nonexistent "'constitutional right' to destroy evidence." *Id.* at 816. In *Johnson*, the Court discussed this issue in a single paragraph, at the end of an opinion addressing the completely different topic of whether the Constitution permits

non-unanimous jury verdicts. *Johnson*, 406 U.S. at 365. Even this single paragraph is off-point. The constitutional violation in *Johnson* was a warrantless home arrest, as in *Harris*. *Id.* at 358. As in *Harris*, the Court found the exclusionary rule inapplicable, particularly in light of the fact that Johnson had subsequently been taken before a magistrate and arrested properly. *Id.* at 365. Neither *Segura* nor *Johnson* suggests that suppression would not serve the interest protected by the Fourth Amendment in not being wrongfully detained by the police.

3. The United States' argument concerning identity-related evidence is misplaced in this case and is incorrect in any event.

The United States reproduces (U.S. Br. 22-29) the argument it made in *Tolentino v. New York*, No. 09-11556, *cert. dismissed as improvidently granted*, 563 U.S. 123 (2011), that evidence of a defendant's identity is not a suppressible fruit of an unlawful seizure. This argument is out of place in the present case, which, unlike *Tolentino*, does not involve the suppression of evidence of the defendant's identity or evidence solely derived therefrom. The argument is incorrect in any event.

In *Tolentino*, the defendant sought to suppress Department of Motor Vehicles records that were in the DMV's own possession long before the defendant was unlawfully detained. The stop was not the means by which the government obtained the evidence at issue. The present case, by contrast, involves the suppression of physical evidence found in

Edward Strieff's pockets while he was being unlawfully detained by the police. The unlawful stop *was* the means by which the government obtained this evidence. The United States' argument about identity-related evidence, if accepted, would mean that the *arrest warrant* is not suppressible, but Strieff has never contended that the arrest warrant is suppressible.

Nor does this case involve the suppression of evidence "derive[d] from the bare fact of a suspect's identity." U.S. Br. 25. The "fact" of Strieff's identity was just one of three facts from which the evidence in this case was derived. The others were of course a patently unconstitutional detention and a routine warrant check. The United States' "bare fact" argument, if accepted, would permit the introduction of evidence obtained "*solely* through the *otherwise lawful* use of information." *Id.* (emphases added). But it would not permit the introduction of the evidence found in Edward Strieff's pockets as the direct result of an unconstitutional detention. The present case involves physical evidence and a straightforward *Terry* violation, not evidence of identity or evidence solely derived therefrom.

The United States' argument is, in any event, incorrect. It would allow the police, without any suspicion whatsoever, to stop every pedestrian and every car on the road in order to demand identification, run warrant checks on every person they stop, and conduct searches whenever the database returns a hit. In the view of the United States, any evidence obtained as a result of such stops would be admissible as evidence derived from the defendants' identi-

ty. Likewise, the police could, without any suspicion of wrongdoing, barge into all homes and demand identification from the occupants, run warrant checks on everyone, and conduct searches as above. As the United States sees it, evidence obtained as a result of such home invasions would be admissible as evidence derived from the defendants' identity. This argument is a blueprint for a police state. To our knowledge, it has never been accepted by any court. The three Court of Appeals cases the United States cites (U.S. Br. 27) in support of the rule it proposes do not, in fact, apply any such rule, but merely apply the attenuation exception in a conventional way to the particular facts of each case.

This Court's precedents demonstrate that evidence of a defendant's identity *is* suppressible if the police obtain that evidence by violating the Fourth Amendment. Fingerprints, for example, must be suppressed if the police procure them by means of an unlawful arrest. *Hayes v. Florida*, 470 U.S. 811, 813-18 (1985); *Davis v. Mississippi*, 394 U.S. 721, 722-24 (1969). Photographic and lineup identifications are "suppressible fruits of the Fourth Amendment violation." *United States v. Crews*, 445 U.S. 463, 472 (1980); *see also United States v. Wade*, 388 U.S. 218 (1967). Evidence is likewise suppressible if it was obtained during an unlawful stop for the purpose of discovering the defendant's identity. *See, e.g.*, *Prouse*, 440 U.S. at 650-51, 663 (affirming the suppression of marijuana obtained during an unlawful automobile stop for the purpose of checking the driver's license).

The United States attempts (U.S. Br. 28) to sidestep all these cases by drawing a metaphysical distinction between the use of identity information "to identify the defendants" and the use of identity information "to link the defendants to a crime." But this is no distinction at all. In a criminal investigation, the purpose of identifying a defendant is always to link him to a crime.

The United States bases its theory primarily on a single sentence in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984), in which the Court stated: "The 'body' or identity of a defendant ... is never itself suppressible as a fruit of an unlawful arrest." *See also id.* at 1043 (paraphrasing this sentence). In context, however, the Court was referring only to the defendant's physical body or identity, not to "identity" in the sense of documentary evidence identifying the defendant. Lopez-Mendoza argued that his unlawful arrest should exempt him from having to appear in court. *Id.* at 1040. The Court rejected this argument, because it was contrary to the familiar principle that the defendant's person is not a suppressible fruit of an unlawful arrest. *Id.* at 1039-40 (citing, *inter alia*, *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975), and *Frisbie v. Collins*, 342 U.S. 519, 522 (1952)). *Lopez-Mendoza* had no occasion to discuss the suppression of evidence of identity in the sense of documents identifying the defendant, because Lopez-Mendoza did not seek to suppress any such evidence. *Lopez-Mendoza* thus provides no support for the United States' view.

But there is no need to address this issue in the present case, which involves the suppression of nei-

ther a defendant's identity nor evidence derived solely therefrom.[6] This case involves the suppression of physical evidence found in the defendant's pockets as a direct result of a clear violation of the Fourth Amendment.

B. The exclusionary rule is necessary to deter the police from making unconstitutional stops to run routine warrant checks.

The purpose of the exclusionary rule "is to deter future Fourth Amendment violations." *Davis*, 131 S. Ct. at 2426. In certain situations, the police have such a strong incentive to violate the Fourth Amendment that exclusion is the only remedy that will assure their compliance with the Constitution. As the Court has explained, "the value of deterrence depends upon the strength of the incentive to commit the forbidden act." *Hudson*, 547 U.S. at 596. The "benefits of deterrence" thus "outweigh the costs," *Herring*, 555 U.S. at 141, in circumstances where, in the rule's absence, the police would be very likely to engage in a pattern of repeated Fourth Amendment violations.

This is such a circumstance. This case involves a recurring situation in which some police officers are

---

[6] Nor does this case provide any occasion to consider amicus CJLF's recitation of the standard arguments against the exclusionary rule, arguments the Court has rejected for decades. *See, e.g.*, *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring in part and concurring in the judgment) ("the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt").

not just likely to violate the Fourth Amendment; they already do. In some jurisdictions, the police run routine warrant checks on the people they encounter, regardless of whether the police have reasonable suspicion of criminal activity, and regardless of whether they have any reason to believe that the person being stopped has any outstanding warrants.

This is not surprising, considering the incentives the police face. Arrest warrants exist for a large fraction of the population. The police know that if they routinely stop people and check for warrants, a substantial percentage of the checks will yield "hits." Where the police discover an outstanding warrant, they can perform an arrest of a person whom they would otherwise lack probable cause to arrest, and they can conduct a search incident to arrest of a person whom they would otherwise lack probable cause to search. Where the warrant check comes back negative, the police send the person on his way, after subjecting him to the indignity and disruption of an unconstitutional interaction with the police. The exclusionary rule is necessary to deter this practice.

Moreover, the deterrence value of the exclusionary rule is at its peak where police conduct is "sufficiently culpable that such deterrence is worth the price paid by the justice system"—that is, where the police are engaging in "deliberate, reckless, or grossly negligent conduct." *Herring*, 555 U.S. at 144. Exclusion is appropriate where the police act deliberately in circumstances where they ought to know that they are violating the Constitution—where they "may properly be charged with knowledge, that the search was unconstitutional under the Fourth

Amendment." *Krull*, 480 U.S. at 348-49 (quoting *United States v. Peltier*, 422 U.S. 531, 542 (1975)).

Again, this is such a circumstance. These routine warrant checks, in the absence of reasonable suspicion, are not isolated accidents. They are deliberately undertaken by police officers who ought to know the basic Fourth Amendment principle that reasonable suspicion requires specific, particularized facts demonstrating that the person being detained is or has been involved in criminal activity. This is police misconduct that only the exclusionary rule can deter.

For this reason, many lower courts have recognized that the only realistic way to deter the police from conducting warrant checks without reasonable suspicion is to exclude the evidence so obtained. "Were it otherwise," the Kansas Supreme Court observed, "law enforcement officers could randomly stop and detain citizens, request identification, and run warrants checks despite the lack of any reasonable suspicion to support the detention, knowing that if the detention leads to discovery of an outstanding arrest warrant, any evidence discovered in the subsequent search will be admissible against the defendant." *State v. Moralez*, 300 P.3d 1090, 1102 (Kan. 2013).

Several state courts, which have a broad view of how the state's police officers conduct themselves, have expressed the same concern. As the Texas Court of Criminal Appeals concluded, "to admit the physical evidence because of the fortuity that an arrest warrant happens to come to light before the evidence is discovered perversely serves to encourage,

rather than discourage, official misconduct and renders the Fourth Amendment toothless." *State v. Mazuca*, 375 S.W.3d 294, 306 (Tex. Crim. App. 2012). The Oregon Supreme Court likewise recognized that where "people are unlawfully detained in the hope of ultimately executing outstanding warrants, the exclusionary rule serves as a deterrent to protect the innocent, not just the guilty, from unreasonable searches and seizures." *State v. Bailey*, 338 P.3d 702, 711 (Or. 2014).

The Appellate Court of Illinois noted:

> suppressing evidence under the present circumstance furthers the goal of the exclusionary rule. In fact, it appears to be the only way to deter the police from randomly stopping citizens for the purpose of running warrant checks. .... If we were to adopt the rule that the State advocates, there would be no reason for the police not to stop whomever they please to check for a warrant.

People v. Mitchell, 824 N.E.2d 642, 650 (Ill. App. Ct. 2005). *See also State v. Hummons*, 253 P.3d 275, 278 (Ariz. 2011) (applying the exclusionary rule to deter the police from "routinely illegally seizing individuals, knowing that the subsequent discovery of a warrant would provide after-the-fact justification for illegal conduct"); *State v. Shaw*, 64 A.3d 499, 512 (N.J. 2012) ("The random detention of an individual for the purpose of running a warrant check—or determining whether the person is wanted on a particular warrant—cannot be squared with values that inhere in the Fourth Amendment."); *State v. Grayson*, 336

S.W.3d 138, 149 (Mo. 2011) ("To hold that the discovery of a warrant in this case removed the taint of the illegality would be akin to holding that the substance of a confession obtained by coercion removes the taint of the coercive practices used to obtain it.") (citation omitted).

The Sixth Circuit has also thoroughly addressed this need for deterrence. After explaining why the exclusionary rule ought to apply, the court continued:

> To hold otherwise would create a rule that potentially allows for a new form of police investigation, whereby an officer patrolling a high crime area may, without consequence, illegally stop a group of residents where he has a 'police hunch' that the residents may: 1) have outstanding warrants; or 2) be engaged in some activity that does not rise to a level of reasonable suspicion. Despite a lack of reasonable suspicion, a well-established constitutional requirement, the officer may then seize those individuals, ask for their identifying information (which the individuals will feel coerced into giving as they will have been seized and will not feel free to leave or end the encounter), run their names through a warrant database, and then proceed to arrest and search those individuals for whom a warrant appears. Under this scenario, an officer need no longer have reasonable suspicion or probable cause, the very crux of our Fourth Amendment jurisprudence.

United States v. Gross, 662 F.3d 393,404-05 (6th Cir. 2011).

As these courts have recognized, the exclusionary rule is the only meaningful deterrent. The United States asserts (U.S. Br. 29-32) that officers already face substantial deterrents to making these unlawful stops, in the form of danger to themselves, civil liability, investigation by the Justice Department, and community hostility. This assertion cannot be reconciled with the reality that officers in some jurisdictions routinely run warrant checks on the people they meet, even without reasonable suspicion. It is not hard to see why these ostensible deterrents do not work. Someone unable to pay a traffic ticket is unlikely to have the wherewithal to obtain counsel. Lawyers are unlikely to take such cases, which require difficult factual investigation, and in which the possibility of a significant recovery is unlikely. The Justice Department is able to investigate only a tiny percentage of police departments.[7] The officers most prone to making unconstitutional *Terry* stops are often those least concerned about how they are viewed in the communities they police.

The Seventh Circuit, in the leading case taking the opposing view, was concerned that applying the exclusionary rule would allow the defendant to go

---

[7] In the past two decades the Justice Department has investigated 67 police departments. Kimbriell Kelly et al., *Forced Reforms, Mixed Results*, Washington Post, Nov. 13, 2015 (http://goo.gl/01WmJ0). There are approximately 18,000 police agencies in the United States. Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 Minn. L. Rev. 1343, 1367 (2015).

free despite the arrest warrant. *United States v. Green*, 111 F.3d 515, 521 (7th Cir. 1997) ("It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of 'Olly, Olly, Oxen Free.'") But this concern is unfounded, because the defendant will not go free. The police have every right to make a lawful arrest of a person named in an arrest warrant. As the court below correctly observed, "[n]o one is contesting—or even could reasonably contest—the arrest on the outstanding warrant." Pet. App. 32 n.12. The exclusionary rule is necessary to deter unlawful stops, but in this situation the defendant can still be arrested for the offense that gave rise to the warrant.[8]

Utah (Pet. Br. 26-27) and the United States (U.S. Br. 31) acknowledge the exclusionary rule's deterrent value, but they are mistaken, for several reasons, in supposing that the exclusionary rule is

---

[8] When the defendant is arrested he can also be searched incident to the arrest, but only to the extent necessary to protect the officer's safety and to preserve evidence of the offense for which the defendant is being arrested. The defendant cannot be searched for evidence of *other* unrelated offenses which the police lack probable cause to believe the defendant has committed. The Court has made clear that "the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence *of the offense of arrest*." *Arizona v. Gant*, 556 U.S. 332, 339 (2009) (emphasis added); *see also id.* at 353 (Scalia, J. concurring) (observing that a search incident to arrest is lawful "only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred").

needed only to deter a subset of unlawful stops the state refers to as "dragnet-type" stops (Pet. Br. 27).

First, the unconstitutional stops that will be deterred by the exclusionary rule are not merely cases of "isolated negligence" as in *Herring*, 555 U.S. at 137 Rather, these warrant checks without reasonable suspicion are common enough to be "systemic error." *Id.* at 147. They form a "demonstrated pattern" of constitutional violations. *Hudson*, 547 U.S. at 604 (Kennedy, J., concurring in part and concurring in the judgment). It is ordinary police practice in some jurisdictions for officers to run warrant checks on the people they meet, regardless of whether the police have any reason to believe that the citizens they encounter have committed any wrongdoing or have any outstanding arrest warrants. It will quickly become ordinary police practice everywhere if the Court holds that the exclusionary rule does not apply.

Second, these unconstitutional stops need deterring whether or not the police structure them as "dragnets." No doubt, if the police were to cordon off a neighborhood and run "dragnet-type" warrant checks on every person within the perimeter, the police would be committing a wholesale violation of the Fourth Amendment, and the exclusionary rule would be an appropriate deterrent to such behavior. But the Fourth Amendment violation would be just as wholesale, and the exclusionary rule would be just as appropriate a deterrent, if the unlawful warrant checks were being run by a single police officer like Detective Fackrell, who simply walks around a neighborhood and runs warrant checks without reasonable suspicion on the people he happens to en-

counter. There is nothing special about "dragnets" that justifies treating them differently from any other "widespread pattern of violations." *Id.*

Third, these unconstitutional stops are not even necessary for the police to serve arrest warrants. As the United States concedes (U.S. Br. 30), an officer seeking to learn whether a person has an outstanding warrant has several options that would not violate the Constitution. The officer could ask the person his name without detaining him and taking his ID. The officer could follow the individual to his car and use the license plate number to check the warrant database. The officer could do some old-fashioned investigation and speak with the person's neighbors or coworkers. The problem is that some officers are currently choosing the unconstitutional shortcut of detaining people without reasonable suspicion.

Fourth, as recent events have made all too clear, in many communities unconstitutional stops are giving rise to considerable distrust of the police. The Justice Department's investigation of Ferguson concluded that unlawful stops and warrant checks formed part of a pattern of police behavior that has "generated great distrust of Ferguson law enforcement, especially among African-Americans." *Investigation of the Ferguson Police Department* at 79. The Justice Department concluded that this resentment of the police made policing "less effective, more difficult, and more likely to discriminate." *Id.* There are likely many other communities in the United States where the climate would be found to be similar if

they were investigated as thoroughly as the Justice Department investigated Ferguson.

Finally, the exclusionary rule's deterrent value is at its greatest when brought to bear on the individual officer's judgment in an individual case. An officer observing a person in circumstances falling short of reasonable suspicion must make a choice. Should he detain the person unlawfully, in the hope that the person will turn out to have an outstanding arrest warrant? Or should he gather more information, which may give him reasonable suspicion to conduct a *Terry* stop? If the exclusionary rule applies, officers will choose the second option. But if the exclusionary rule does not apply, officers will choose the first. Officers make this choice every day, in cities all over the country, including many cities where the police know that a significant percentage of the residents have outstanding arrest warrants. This is exactly why we have the exclusionary rule.

It bears emphasizing that most of the people protected by the exclusionary rule against these unlawful stops will be people *without* outstanding arrest warrants, people the police have no business disturbing. As Justice Jackson observed, there are many unlawful stops "which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear." *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J. dissenting). His conclusion is still true today: "Courts can protect the innocent against such invasions indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." *Id.*

CONCLUSION

The judgment of the Utah Supreme Court should be affirmed.

Respectfully submitted,

STUART BANNER
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095

PATRICK L. ANDERSON
JOAN C. WATT
Counsel of Record
Salt Lake Legal Defender Association
424 E. 500 South, Ste. 300
Salt Lake City, UT 84111
(801) 532-5444
jwatt@sllda.com

SUPREME COURT, U.S.
FILED
FEB - 9 2015
OFFICE OF THE CLERK

No. 14-1373

In The Supreme Court of the United States

STATE OF UTAH,

Petitioner,

v.

EDWARD JOSEPH STRIEFF, JR.,

Respondent.

On Writ Of Certiorari To The Utah Supreme Court

REPLY BRIEF FOR PETITIONER

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
LAURA B. DUPAIX
Deputy Solicitor General
THOMAS B. BRUNKER
Criminal Appeals Director
JEFFREY S. GRAY
Search & Seizure Section Director
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@utah.gov
Counsel for Petitioner

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. THE COURT'S EXISTING ATTENUATION ANALYSIS ALREADY DETERS FLAGRANT MISCONDUCT, INCLUDING THE FLAGRANT MISCONDUCT THAT STRIEFF WARNS AGAINST 2

II. TORT FORESEEABILITY NEITHER ANIMATES NOR CONSTRAINS THE ATTENUATION EXCEPTION 11

A. This Court Has Never Held That Only Unforeseeable Intervening Events Can Attenuate The Taint Of Prior Illegality 12

B. *Brown* Disavows Strieff's Suggestion That Its Factors Are Exclusive In Every Attenuation Case. 15

C. Strieff's Hypothetical Examples Illustrate Why Tort Foreseeability Is Ill-Suited To Achieving Appreciable Deterrence. 17

III. THE EVIDENCE SEIZED FROM STRIEFF IS ADMISSIBLE UNDER A STRAIGHTFORWARD APPLICATION OF THIS COURT'S EXISTING ATTENUATION EXCEPTION. 19

IV. ADOPTING STRIEFF'S RULE WOULD UPSET OTHER SETTLED FOURTH AMENDMENT PRECEDENT 25

CONCLUSION 29

TABLE OF AUTHORITIES

FEDERAL CASES

Alabama v. White,
496 U.S. 325 (1990) 21, 22

Berkemer v. McCarty,
468 U.S. 420 (1984) 21, 25

Brown v. Illinois,
422 U.S. 590 (1975) 4, 12, 15, 24

California v. Greenwood,
486 U.S. 35 (1988) 26

Davis v. United States,
131 S. Ct. 2419 (2011) 1, 4, 23

Dunaway v. New York,
442 U.S. 200 (1979) 12, 24

Elliott v. Leavitt,
99 F.3d 640 (4th Cir. 1999) 20

Florida v. Jardines,
133 S. Ct. 1409 (2013) 26

Herring v. United States,
555 U.S. 135 (2009) 23, 24

Hiibel v. Sixth Judicial Dist. Ct. of Nev.,
542 U.S. 177 (2004) 25, 27

Horton v. California,
496 U.S. 128 (1990) 14

Hudson v. Michigan,
547 U.S. 586 (2006) 7

Illinois v. Gates,
462 U.S. 213 (1983) 20

Johnson v. Louisiana,
406 U.S. 356 (1972) 4

Kaupp v. Texas,
538 U.S. 626 (2003) 12, 24

Kentucky v. King,
563 U.S. 452 (2011) 14, 15, 17, 19, 20

Milwaukee & St. Paul Ry. Co. v. Kellogg,
94 U.S. 469 (1876) 13

Navarette v. California,
134 S. Ct. 1683 (2014) 22

New York v. Harris,
495 U.S. 14 (1990) 28

Oliver v. United States,
466 U.S. 170 (1984) 26

Rawlings v. Kentucky,
448 U.S. 98 (1980) 12, 16

Taylor v. Alabama,
457 U.S. 687 (1982) 12, 24

Terry v. Ohio,
392 U.S. 1 (1968) 22, 25

United States v. Arvizu,
534 U.S. 266 (2002) 19, 20

United States v. Ceccolini,
435 U.S. 268 (1978) 4, 12, 16

United States v. Cortez,
449 U.S. 411 (1981) 20

United States v. Hensley,
469 U.S. 221 (1985) 27

United States v. Janis,
428 U.S. 433 (1976) 1

United States v. Leon,
468 U.S. 897 (1984) 3, 4, 23

United States v. Sharpe,
470 U.S. 675 (1985) 24

United States v. Robinson,
414 U.S. 218 (1973) 1, 4, 28

Wong Sun v. United States,
371 U.S. 471 (1963) 3, 4, 12, 14

Wyoming v. Houghton,
526 U.S. 295 (1999) 22

Ybarra v. Illinois,
444 U.S. 85 (1979) 22

STATE CASES

People v. Mitchell,
824 N.E.2d 642 (Ill. App. Ct. 2005) 6

State v. Bailey,
338 P.3d 702 (Or. 2014) 6

State v. Grayson,
336 S.W.3d 138 (Mo. 2011) 6

State v. Shaw,
64 A.3d 499 (N.J. 2012) 6, 16

OTHER AUTHORITIES

Science Applications Int'l Corp.,
Un-served Arrest Warrants: An Exploratory Study
(Apr. 22, 2004) 12

United States 2010 Census 8

Utah Statewide Warrants Search 26

INTRODUCTION

Both parties agree that Detective Fackrell lawfully arrested Strieff on a valid outstanding warrant. (Resp. Br. 25.) Because the arrest was lawful, the search incident to that arrest was lawful. *United States v. Robinson*, 414 U.S. 218, 235 (1973). The sole question here is whether the exclusionary rule should be extended to the lawfully seized evidence from that search because the detective first learned about the warrant during an investigatory stop later judged unlawful. Under this Court's settled attenuation analysis, the answer is no.

The exclusionary rule exists solely to deter police from violating constitutional rights. Because suppression exacts a heavy toll on the truth-finding process, it "is 'clearly . . unwarranted'" unless it "yield[s] '*appreciable* deterrence.'" *Davis v. United States*, 131 S. Ct. 2419, 2426-27 (2011) (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)) (emphasis added) (ellipses in original).

Suppressing evidence lawfully seized incident to a warrant-arrest—even when the warrant was discovered during an unlawful investigatory stop—will not appreciably deter future unlawful investigatory stops unless the predicate stop was flagrantly unlawful. Because Detective Fackrell's initial stop here was not flagrantly unlawful, suppression is unwarranted.

Strieff wants this Court to replace the existing attenuation inquiry with one that looks to whether the intervening event was foreseeable. But shifting

attenuation's focus from the conduct to be deterred to whether an intervening event is foreseeable will not serve the exclusionary rule's purpose of achieving appreciable deterrence. And Strieff has not shown that foreseeability is a workable way to assess deterrence value; he gives no way for law enforcement officers or judges to determine when any particular intervening event—including an arrest on a preexisting warrant—becomes sufficiently probable as to be reasonably foreseeable.

ARGUMENT

I. THE COURT'S EXISTING ATTENUATION ANALYSIS ALREADY DETERS FLAGRANT MISCONDUCT, INCLUDING THE FLAGRANT MISCONDUCT THAT STRIEFF WARNS AGAINST.

Strieff now agrees that the Utah Supreme Court's holding "restrict[ing]" the attenuation exception "to circumstances involving an independent act of a defendant's 'free will' in confessing to a crime or consenting to a search," App. 27, is "too narrow," Resp. Br. 29 n.4.

But the parties still disagree on what the correct rule should be. Utah asks the Court to apply the analysis that has long governed attenuation cases—an inquiry that, in the context of a warrant-arrest, requires suppression only when the predicate unlawful conduct was flagrant.

In contrast, Strieff's newly proposed attenuation rule asks that any evidence seized as a "foreseeable consequence" of police misconduct be suppressed. Resp. Br. 22. Strieff's rule conflicts with this Court's existing attenuation inquiry. And it is unnecessary to deter the misconduct he warns against because this Court's inquiry already does that.

1. The exclusionary rule does not require suppressing everything "which deters illegal searches." *United States v. Leon*, 468 U.S. 897, 910 (1984) (internal quotation marks omitted). Thus, under the Court's attenuation exception, evidence obtained following unlawful police conduct may still be admissible if it was not "come at by exploitation of that illegality" but "instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (internal quotation marks and citation omitted). The attenuation inquiry tries "'to mark the point at which the detrimental consequences of illegal police action become so attenuated'" by time or other intervening circumstances "'that the deterrent effect of the exclusionary rule no longer justifies its cost.'" *Leon*, 468 U.S. at 911 (quoting *Brown v. Illinois*, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part)).

That fact-specific inquiry ensures that suppression yields appreciable deterrence by focusing on the nature of the intervening

circumstance and the culpability of the police misconduct. (*See* Petr. Br. 14-20.)

The Court has found attenuation when the intervening circumstance was an event arising from the judicial process—such as an arraignment (*Wong Sun*, 371 U.S. at 491) or a commitment (*Johnson v. Louisiana*, 406 U.S. 356, 365 (1972))—or from the decisions or actions of a third-party witness (*United States v. Ceccolini*, 435 U.S. 268, 276-78 (1978)) or the defendant himself (in confession cases).

An arrest on a preexisting warrant is just as capable of purging the taint of prior unlawful conduct. A warrant represents a judicial finding before the stop that all constitutional requirements for arresting the suspect have been satisfied on facts unrelated to the stop. An "officer has a sworn duty to carry out" the warrant's "provisions," *Leon*, 468 U.S. at 920 n.21 (internal quotation marks and citation omitted), and "the fact of the lawful arrest . . . establishes the authority to" perform a "full search," *Robinson*, 414 U.S. at 235. (Petr. Br. 21-28.)

Suppression might nevertheless be appropriate despite those intervening events if the predicate "official misconduct" was "flagran[t]," *Brown*, 422 U.S. at 604—*i.e.*, evinces "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights," *Davis*, 131 S. Ct. at 2427-28 (internal quotation marks and citations omitted).

The majority of courts that have analyzed attenuation in the outstanding-warrant scenario have concluded that a warrant-arrest is an intervening circumstance that attenuates the taint of a prior nonflagrant unlawful stop. (*See* Pet. for Cert. 8-12.) Strieff cites nothing to show that the majority's conclusion has proven unworkable or led to systemic flagrantly unlawful investigatory stops in those jurisdictions.

2. Strieff nevertheless cites news reports and legal scholarship to raise the specter of irresistible incentives leading to an unconstrained police state if this Court applies its longstanding attenuation inquiry to hold, like the majority of courts, that a warrant-arrest can be an intervening circumstance that attenuates the taint of prior misconduct. (Resp. Br. 1-13.) His argument misunderstands that inquiry. Because the existing inquiry hinges on the culpability of an officer's predicate act, it already accounts for—and thus will appreciably deter—the police misconduct that Strieff incorrectly suggests would necessarily follow from applying it.

Take Strieff's example of the encounter between the Ferguson police officer and a man waiting for a bus. (*See* Resp. Br. 7.) On Strieff's recitation of that encounter, suppression would be appropriate under this Court's existing inquiry if the officer had found a warrant, executed it, and discovered contraband in a search incident to that arrest. Because the

predicate stop was obviously unlawful—police may not detain a person without *any* basis—suppressing the seized evidence would appreciably deter similar future stops.

Indeed, several of the cases Strieff cites in support of his proposed foreseeability test (Resp. Br. 50-52) are from jurisdictions that apply the Court's traditional attenuation analysis to warrant-arrests. Rather than justifying a change in the existing rule, these cases show why the rule works—they suppressed the evidence because the predicate stop was flagrantly unlawful.[1]

The exclusionary rule is not the only tool to deter such flagrant police misconduct in any event. "[C]ivil liability is an effective deterrent," as is "the

---

[1] *See, e.g.*, *People v. Mitchell*, 824 N.E.2d 642, 644, 649-50 (Ill. App. Ct. 2005) (finding predicate stop to be flagrantly unlawful because officer stopped defendant who had "[no]thing suspicious" about him—he "was just walking"); *State v. Grayson*, 336 S.W.3d 138, 148 (Mo. 2011) (finding predicate stop to be flagrantly unlawful because officer "had no basis for continuing the detention of [driver] but detained him anyway exclusively based on a hunch"); *State v. Shaw*, 64 A.3d 499, 511-12 (N.J. 2012) (finding predicate stop to be flagrantly unlawful because officers trying to execute warrant stopped defendant even though "only discernible features" he shared with man named in warrant "were that both were black men"); *State v. Bailey*, 338 P.3d 702, 714 (Or. 2014) (finding predicate stop to be flagrantly unlawful because purpose of stop was completed after five minutes but officers extended stop for thirty more minutes).

increasing professionalism of police forces, including a new emphasis on internal police discipline" and "the increasing use of various forms of citizen review." *Hudson v. Michigan*, 547 U.S. 586, 598-99 (2006). "[I]t is not credible to assert" that these mechanisms do not also deter flagrant misconduct. *Id.* at 599. Department of Justice investigations—like the one in Ferguson (Resp. Br. 7-8)—provide additional deterrence when necessary. (U.S. Br. 32.)

3. Strieff fails to show that foreseeability is a workable way to assess culpability in the context of warrant-arrests because he does not prove that officers can reasonably foresee finding a warrant in any given stop.

Strieff asserts that finding an outstanding warrant during a stop is nearly always foreseeable because police routinely check for warrants during their "encounter[s]" with the public, and "[a]rrest warrants exist for a large fraction of the population." (Resp. Br. 49.) Thus, Strieff reasons, "police know that if they routinely stop people and check for warrants, a substantial percentage of the checks will yield 'hits.'" *Id.*

Strieff's statistics do not prove that "a large fraction of the population" have outstanding arrest warrants. He cites only raw numbers of outstanding warrants—most from a decade or more ago—in places such as Florida, Washington, California, and

Ferguson, Missouri. *Id.* at 1-5. His contention that these numbers represent a "large fraction of the population" rests on two premises: that each warrant names a separate person (rather than one person being named in multiple warrants), and that each person named in a warrant resides in the cited state or city. Strieff cites nothing to show that either premise is true. His conclusion thus cannot logically be confirmed.

Even assuming his two premises are true, the numbers Strieff cites correspond to only a small fraction of the total adult population. For example, if Florida's 323,000 outstanding warrants correspond to the number of *people* with warrants, *id.* at 2, that amounts to only 2.2% of Florida's total adult population of 14.7 million.[2] Likewise, Washington's 370,000 warrants would come to only 7.2% of its adult population and California's 2.5 million warrants would reach only 8.9% of its adult population. When 90% or more of the adult population does *not* have a warrant, police cannot have confidence that "a *substantial* percentage of the people they meet on the street will have an outstanding arrest warrant." (Resp. Br. 4) (emphasis added).

---

[2] The population numbers used to calculate these percentages are taken from the United States 2010 Census at www.census.gov/2010census/.

Superficially, Strieff's warrant numbers for cities, particularly for Ferguson, appear to yield a higher probability of finding a warrant in any stop. *Id.* at 1-5. Strieff calculates that over 75% of Ferguson's total 21,000 residents have an outstanding warrant. His calculation is based on 16,000 outstanding warrants from Ferguson's courts. *Id.* at 1-4.

But Strieff's calculations again rest on the two premises discussed above—that Ferguson's warrants name only Ferguson residents and that each warrant names a different Ferguson resident. But according to the 2010 U.S. Census, Ferguson's total adult population is roughly 15,000 people. That means Ferguson has roughly 1,000 more warrants than individual adult residents who could be named in them.

Probability—or reasonable foreseeability—of a warrant's existence therefore cannot be proven merely by comparing the number of warrants to the total number of residents. That is especially true if, as Strieff says, most of the outstanding warrants are for failing "to pay a traffic ticket." (Resp. Br. 4.) Traffic violators are an inherently mobile population just as likely to reside elsewhere. That is particularly so when a city, like Ferguson, is part of a greater metropolitan area (St. Louis) that sees pass-through traffic from contiguous communities.

In any event, Ferguson is an extreme example that does not accurately represent municipalities throughout the country. First, the principal problem that the Department of Justice reported was that the municipal court system was issuing too many arrest warrants for failing to appear or failing to pay a fine. U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 42 (2015) ("Our review of police and court records suggests that much of the harm of Ferguson's law enforcement practices in recent years is attributable to the court's routine use of arrest warrants to secure collection and compliance when a person misses a required court appearance or payment."). Strieff cites no evidence of similar egregious overuse of arrest warrants in other communities.

In fact, the available evidence suggests an absence of such problems. A 2004 report to the Department of Justice found that between March and August of 2001, there were 11,464 warrants outstanding in Montgomery County, Maryland. Science Applications Int'l Corp., *Un-served Arrest Warrants: An Exploratory Study* 13 (Apr. 22, 2004), at http://www.ilj.org/publications/docs/Unserved_Arrest_Warrants.pdf (last visited Feb. 8, 2016). And between July and December 2000, there were 25,411 warrants outstanding in Hennepin County, Minnesota. *Id.* at 23. Based on 2000 U.S. Census data reporting a total population of 873,341 in

Montgomery County (*id.* at 8) and 1,116,200 in Hennepin County (*id.* at 7), those warrants represent only 1.3% and 2.3% of the total population, respectively—assuming that no one person was subject to more than one warrant, *see id.* at 25 ("an arrestee may have multiple warrants outstanding"). It is therefore misleading to suggest that Ferguson is representative of national trends.

In short, Strieff's numbers do not prove a significant probability that any person stopped by police will have an outstanding warrant. Strieff ultimately seems to agree: "It bears emphasizing that most of the people protected by the exclusionary rule against these unlawful stops will be people *without* outstanding arrest warrants." (Resp. Br. 57.) Without such a probability, Strieff cannot show that finding a warrant during a stop is foreseeable enough to create an irresistible incentive for officers to conduct stops that they know are unlawful.

II. TORT FORESEEABILITY NEITHER ANIMATES NOR CONSTRAINS THE ATTENUATION EXCEPTION.

Strieff's invitation to move attenuation's "focus" from deterrence to "the foreseeability of the alleged intervening circumstance," Resp. Br. 30, contravenes longstanding Fourth Amendment and exclusionary rule jurisprudence. It would cause the judicial administrability problems that led this Court to reject a foreseeability test in other Fourth Amendment contexts. And applying Strieff's test

would not affect the outcome here because his intervening warrant-arrest was not reasonably foreseeable.

A. This Court Has Never Held That Only Unforeseeable Intervening Events Can Attenuate The Taint Of Prior Illegality.

1. Strieff contends that this Court's attenuation cases have "focused on whether the alleged intervening circumstance was an unforeseeable event unrelated to the officer's unlawful conduct (in which case the Court has found attenuation), or whether the alleged intervening circumstance was itself foreseeably caused by the officer's unlawful conduct (in which case the Court has found no attenuation)." (Resp. Br. 29-30) (citing *Rawlings v. Kentucky*, 448 U.S. 98, 108 (1980); *Ceccolini*, 435 U.S. at 276; *Wong Sun*, 371 U.S. at 491; *Kaupp v. Texas*, 538 U.S. 626, 633 (2003); *Taylor v. Alabama*, 457 U.S. 687, 691 (1982); *Dunaway v. New York*, 442 U.S. 200, 218 (1979); *Brown*, 422 U.S. at 604)).

The seven cases he cites, however, do nothing of the sort. Not one of them contains the word "foreseeable," let alone relies on foreseeability to determine attenuation.

Unable to cite an attenuation case from this Court discussing foreseeability, Strieff suggests that *Brown* borrowed attenuation's "intervening circumstance[]" inquiry (422 U.S. at 603-04) from "proximate cause analysis in tort law." (Resp. Br. 28)

(citing, *inter alia*, *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1876), three tort treatises, and a Restatement). He reasons that because an intervening circumstance must be unforeseeable under tort law to free a tortfeasor from liability, it must also be unforeseeable under a Fourth Amendment attenuation analysis before it can attenuate the taint of an unlawful predicate act. *Id.* at 28-31.

Nothing in this Court's attenuation precedent supports Strieff's suggestion that the tort doctrine of intervening cause—complete with its unforeseeability component—has been imported into, and now applies coextensively to, attenuation analysis. If anything, the Court's precedent suggests the opposite.

First, as stated, the word "foreseeable" is notably absent from this Court's attenuation cases. As Strieff implicitly acknowledges, the concept of foreseeability existed in tort law long before this Court created the attenuation exception. *Id.* at 28. Given the venerable role that foreseeability and proximate cause have played in tort law, it seems unlikely that the Court would make these concepts the touchstone of its attenuation jurisprudence without calling them by name.

Second, this Court has consistently refused to make foreseeability a component of the Fourth Amendment's reasonableness analysis. *See, e.g.*,

Kentucky v. King, 563 U.S. 452, 464-66 (2011) (refusing to consider foreseeability of defendant's response to lawful police conduct in assessing reasonableness of officers' actions under exigent-circumstances exception); *Horton v. California*, 496 U.S. 128, 138-42 (1990) (holding that reasonableness of plain-view seizure does not depend on whether officers' discovery of evidence in plain view was inadvertent, but on whether officers reasonably arrived at place where evidence was seized). Strieff gives no reason for this Court to adopt foreseeability in the attenuation context after rejecting it in other Fourth Amendment contexts.

Because the reasonableness of police conduct does not depend on whether an officer is "interested in an item of evidence and fully expects to find it in the course of a search," *Horton*, 496 U.S. at 138, suppression following a predicate unlawful search or seizure cannot logically depend on whether the discovery of the evidence was foreseeable. Just as the predicate for warrantless searches is reasonableness (not foreseeability), the predicate for attenuation is that the evidence "has been come at" through a non-flagrant violation. *Wong Sun*, 371 U.S. at 488 (internal quotation marks and citation omitted). Neither inquiry turns on whether officers could have foreseen that they would discover the evidence.

Just as *King* declined to apply foreseeability to the exigent-circumstances inquiry, *see* 563 U.S. at 464, the Court should decline Strieff's proposal to shift attenuation's focus from flagrancy and appreciable deterrence to foreseeability.

B. *Brown* Disavows Strieff's Suggestion That Its Factors Are Exclusive In Every Attenuation Case.

Strieff' contends that courts must decide every attenuation case under three factors that *Brown* found relevant to assessing whether a confession is attenuated from a prior unlawful arrest because "each captures part of the proximate cause inquiry." (Resp. Br. 26. n.3.) Not so.

Brown itself disavows that contention: *"[n]o single fact is dispositive"* to deciding "whether *a confession*" is sufficiently attenuated from an unlawful arrest to be admissible. 422 U.S. at 603 (emphases added). Under *Brown*, attenuation "must be answered on the facts of each case," and evaluated "in light of the [deterrence] policy served by the exclusionary rule," *id.* at 603-04. *Ceccolini* further confirms that the attenuation inquiry "can consistently focus" on different case-specific "factors," including "the differences between live-

witness testimony and inanimate evidence." 435 U.S. at 278-79.[3]

What is more, *Brown* identified a fourth factor that Strieff disregards: the giving of "*Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of the illegal arrest." 422 U.S. at 603; *see also Rawlings*, 448 U.S. at 107 (applying the "*Miranda* warnings" factor as "important, although not dispositive"). By omitting *Brown*'s fourth factor, Strieff impliedly (though perhaps inadvertently) admits that the attenuation inquiry cannot be limited to any particular set of rigid factors.

Utah thus does *not* ask this "Court to pay no mind" to *Brown*'s factors. (Resp. Br. 26 n.3.) Utah instead asks the Court to apply *Brown* and its

---

[3] Strieff places great weight on *Brown*'s temporal proximity factor. (Resp. Br. 26-27.) This factor, however, "is at best neutral" in the context of a warrant-arrest because defendants "cannot credibly argue" that they "would have benefitted by a longer rather than shorter detention before" being arrested on a valid warrant. *Shaw*, 64 A.3d at 509-10. In any event, the Court has found attenuation when only a "relatively short period of time" elapsed between the predicate unlawful conduct and the discovery of evidence. *Rawlings*, 448 U.S. at 108. Strieff's own hypothetical examples suggest that a short temporal proximity does not preclude attenuation—a bystander accusing a detainee of theft and a detainee striking an officer (Resp. Br. 31) occur temporally proximate to the stop's inception yet, in his view, support attenuation.

progeny as written—to suppress evidence only when, given the facts of the case, suppression will yield appreciable deterrence. This view of *Brown*—which the United States (U.S. Br. 13) and more than 30 other States (Br. Michigan, et al. 8, 13) share—harmonizes this Court's attenuation cases in a way that Strieff's proposed test does not.

C. Strieff's Hypothetical Examples Illustrate Why Tort Foreseeability Is Ill-Suited To Achieving Appreciable Deterrence.

Adopting "a reasonable foreseeability test" for attenuation would introduce the same "unacceptable degree of unpredictability" that led this Court to reject that test in the exigency context. *King*, 563 U.S. at 465. If the test were foreseeability, judges would be required in *every* attenuation case "to quantify the degree of predictability that must be reached," *id.*, before *any* intervening event could be reasonably foreseeable.

Strieff's hypothetical examples (Resp. Br. 30-32) applying his foreseeability rule underscore those administrability problems. Nothing but his *ipse dixit* explains why the intervening event is foreseeable in some circumstances but not in others. He offers no standard by which judges can distinguish possibilities from probabilities. Nor does he identify

the level of probability required before a theoretically possible event becomes foreseeable.

For instance, Strieff contends it is unforeseeable—and therefore a possible intervening event—that a detained person would "commit[] a new crime such as striking the officer." (Resp. Br. 31.) But he cites nothing to show that a detainee's striking an officer or committing another crime is so unusual that such an event would be unforeseeable. He certainly cites nothing comparing the incidence of detainees' striking an officer to the incidence of officers' finding a warrant to prove that the first is unforeseeable but the second is not.

Additionally, the number of this Court's cases addressing whether confessions are admissible under the attenuation exception undermines Strieff's claim that confessions are unforeseeable. *Id.* at 31. This Court has analyzed attenuation in the confession context at least six times—in *Kaupp*, *Taylor*, *Dunaway*, *Rawlings*, *Brown*, and *Wong Sun*. Yet it is only now analyzing a warrant-arrest under the exception. This suggests that a confession is at least as likely to follow unlawful police conduct as is a warrant-arrest.

Strieff's rule would produce a conflicting maze of judicial determinations on what intervening events are so foreseeable that they can purge the taint of an initial illegality. *King*'s prescient rejection of this test for the exigent-circumstances exception has

spared judges the "unacceptable and unwarranted difficulties," 563 U.S. at 466, attendant to such analysis. The circumstances here call for the same outcome.

III. The Evidence Seized From Strieff Is Admissible Under A Straightforward Application Of This Court's Existing Attenuation Exception.

The lawful warrant-arrest here was an intervening circumstance that purged the taint of the unlawful predicate stop. Because Detective Fackrell's stop was not flagrantly unlawful, the costs of suppressing the lawfully seized evidence far outweigh any negligible deterrence that suppression might yield.

1. Strieff's contention that "[a]ny reasonably well trained officer would know that the stop in this case was *utterly* lacking in reasonable suspicion" (Resp. Br. 38 (emphasis added)) bespeaks a flawed treatment of the reasonable-suspicion standard, a misreading of the record, or both.

Reasonable suspicion exists when, under "the totality of the circumstances," the "detaining officer has a particularized and objective basis for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotation marks omitted). But "the concept of reasonable suspicion is somewhat abstract," *id.* at 274 (citations omitted), and cannot be reduced "to 'a neat set of

legal rules,'" *id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)) (additional citation omitted). As a result, knowing precisely when the facts amount to reasonable suspicion is often an "elusive" endeavor, *United States v. Cortez*, 449 U.S. 411, 417 (1981)—especially for law enforcement officers who, unlike courts, do not enjoy "the luxury of armchair reflection," *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1999) (citation omitted); *accord King*, 563 U.S. at 466 (recognizing that police "must make quick decisions in the field").

The totality of the circumstances in this case supports the Utah Court of Appeals' conclusion—undisturbed by the Utah Supreme Court—that Detective Fackrell's stop of Strieff "amounted to a misjudgment" resulting in "a single misstep over the constitutional boundary rather than a deliberate transgression." App. 71.

Here, an anonymous tip on a police line reported drug-sales activity, including a description of short-stay traffic, at a particular house. Detective Fackrell did not stop the first person to exit the house. Instead, he watched the house for about three hours over the course of about one week. *Id.* at 4; J.A. 16. Relying on his specialized training and 18 years of experience, he concluded that what he observed during the surveillance corroborated the tip: He saw an amount of short-stay traffic at the house that, though "not terribly frequent," "was more than [he

would] see at a regular house." J.A. 15-16. The "duration" of the short stays was important—"people would come, stay and then leave" within "[j]ust a couple of minutes." *Id.* at 16-17.

So when Detective Fackrell saw Strieff leave the house, "the same as other people had done that [he had] been watching," J.A. 21, he stopped him to ask "a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling [his] suspicions," *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). He stopped Strieff, "told him who I was, told him that I had been watching the house and that I believed there might be drug activity there and asked him if he would tell me what *he* was doing there." J.A. 18 (emphasis added).

The prosecutor conceded that these facts fell just short of reasonable suspicion to stop Strieff. In particular, Detective Fackrell did not know when Strieff had entered the house or how long he had been in it. *See* App. 5. But in light of governing Fourth Amendment precedent, it would not have been obvious to an objectively reasonable well-trained officer that this missing fact so *clearly* eliminated reasonable suspicion as to make the stop unlawful.

It has long been settled that an anonymous tip, "standing alone, would not 'warrant a man of reasonable caution in the belief that [a stop] was appropriate.'" *Alabama v. White*, 496 U.S. 325, 329

(1990) (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). But it is equally settled that if "an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity." *Id.* at 331 (citation omitted); *accord Navarette v. California*, 134 S. Ct. 1683, 1688 (2014) (holding that anonymous tip may be sufficient to establish reasonable suspicion when combined with sufficient corroboration, which may include the confirmation of predicted behavior or even innocent details).

It is also objectively reasonable for an officer to infer that occupants of a home, like occupants of a car, are engaged in a common enterprise. *Cf. Wyoming v. Houghton*, 526 U.S. 295, 304-05 (1999) (recognizing the reasonable inference that "a car passenger . . . will often be engaged in a common enterprise with the driver"). And *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), upon which Strieff relies (Resp. Br. 35), does not compel a different conclusion. The objective facts supporting reasonable suspicion to stop Strieff did not include his "mere propinquity" to someone else in a public place. *Ybarra*, 444 U.S. at 91. Instead, they included Strieff's leaving a private residence that Detective Fackrell reasonably suspected was a site of drug activity.

Under those precedents, this is a close case. There was an objectively reasonable basis to believe that the house was a site of drug sales—Fackrell got a tip that he corroborated by watching the house for about three hours over a week. During those three hours, every person he saw connected to the house would arrive, enter, and leave within a few minutes, which in his experience was consistent with drug-sale activity. (Petr. Br. 2.) At the end of all that, he saw Strieff leave the house.

A "'reasonably well-trained officer'" in Detective Fackrell's shoes could have reasonably misjudged that the totality of these circumstances amounted to reasonable suspicion that Strieff was either a short-term visitor buying drugs or a resident selling them. *Herring v. United States*, 555 U.S. 135, 145 (2009) (quoting *Leon*, 468 U.S. at 922 n.23). The fact that Detective Fackrell did not know whether Strieff was a short- or long-term visitor to (or resident of) the house does not decrease the suspicion that, as someone walking out of a house involved in drug sales, he was involved in that activity. It was at worst a reasonable mistake "involv[ing] only simple, isolated negligence." *Davis*, 131 S. Ct. at 2427-28 (internal quotation marks omitted). In these circumstances, "the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id.* at 2428 (internal quotation marks omitted).

2. Strieff further erroneously asks this Court to "consider the officer's *purpose* in violating the Fourth Amendment" when assessing flagrancy. (Resp. Br. 32 (citing *Brown*, 422 U.S. at 604)). The officer's subjective intent is foreign to the "pertinent analysis of deterrence and culpability." *Herring*, 555 U.S. at 145. Courts do not "inquir[e] into the" officer's "subjective intent" because the flagrancy assessment is "confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the [stop] was illegal in light of all the circumstances." *Id.* at 145-46 (internal quotation marks and citation omitted); *accord Brown*, 422 U.S. at 605 (observing that "impropriety of the arrest was obvious"). (*See* Petr. Br. 24-26.)

Each of the four cases on which Strieff relies to argue otherwise addressed the flagrancy of an arrest made in the absence of probable cause. (*See* Resp. Br. 33 (citing *Kaupp*, 538 U.S. at 633; *Taylor*, 457 U.S. at 691; *Dunaway*, 442 U.S. at 218; *Brown*, 422 U.S. at 605)). Because an arrest must be supported by probable cause, *see United States v. Sharpe*, 470 U.S. 675, 691 (1985), and probable cause to arrest follows (rather than precedes) a preliminary investigation, the officers' "investigatory purposes" there merely confirmed why those specific predicate acts were "obvious[ly]" unlawful, *Brown*, 422 U.S. at 605—reasonable officers would have known that they could not arrest the suspects merely to

investigate so that they could create the very probable cause needed for the arrests.

In contrast, investigatory stops need be supported only by an objectively reasonable suspicion that criminality "may be afoot," *Terry*, 392 U.S. at 30, and officers are allowed to detain a suspect "briefly in order *to investigate* the circumstances that provoke suspicion," *Berkemer*, 468 U.S. at 439 (internal quotation marks and citation omitted) (emphasis added). This Court's "decisions make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops." *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 186 (2004). There is nothing objectively improper about a police officer having an "investigatory purpose" during a *Terry* stop. Rather, an investigatory purpose is the reason for the stop itself.

IV. ADOPTING STRIEFF'S RULE WOULD UPSET OTHER SETTLED FOURTH AMENDMENT PRECEDENT.

Strieff's theory conflates lawful and unlawful conduct in ways that subvert important governmental interests and undermine 40 years of precedent in the law governing arrests.

1. Strieff's overarching objection is that "[t]he police in some jurisdictions run routine warrant checks on the people they encounter, regardless of whether the police have particularized suspicion

that the person being stopped is involved in criminal activity, and regardless of whether they have any reason to believe that the person being stopped has any outstanding warrants." (Resp. Br. 1.) Strieff has not, however, pointed to compelling evidence that officers routinely illegally stop people for the purpose of checking for outstanding warrants.

To the extent that Strieff challenges the practice of running routine warrants checks, officers do not need reasonable suspicion that a person is named in a warrant or involved in criminal activity before running a warrants check. "The Fourth Amendment 'indicates with some precision the places and things encompassed by its protections': persons, houses, papers, and effects." *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *Oliver v. United States*, 466 U.S. 170, 176 (1984)). Because neither a warrant nor the government's own databases fall within that list of protected items, the Fourth Amendment does not require officers to have reasonable suspicion before they check for warrants. And a person has no reasonable expectation of privacy in information accessible to the public, *see California v. Greenwood*, 486 U.S. 35, 40-41 (1988), such as the existence of a warrant, *see* Utah Statewide Warrants Search, https://secure.utah.gov/warrants/index.html (last visited Feb. 8, 2016).

Furthermore, as noted, "questions concerning a suspect's identity are a routine and accepted part of

many *Terry* stops." *Hiibel*, 542 U.S. at 186 (citing, *inter alia*, *United States v. Hensley*, 469 U.S. 221, 229 (1985)). The Fourth Amendment permits such questions because they "serve[] important government interests": The answers can "inform an officer that a suspect is *wanted for another offense*," or maintain officer safety by disclosing a suspect's "record of violence or mental disorder," or "help clear a suspect and allow the police to concentrate their efforts elsewhere." *Id.* (emphasis added). Accordingly, this Court has repeatedly *approved* the questioning and follow-up activity—including warrants checks—about which Strieff complains. (*See* Resp. Br. 6-8.)

2. Strieff's conception of an intervening warrant-arrest portends troubling consequences for the law governing searches incident to lawful arrests. He contends that "[w]here the police make a wrongful stop, run a warrant check, and conduct a search, the entire episode is one continuous transaction. The search takes place *during* the unlawful detention." (Resp. Br. 27.)

But the search here did not take place during the unlawful detention. It took place after an arrest that Strieff concedes was lawful. (*See id.* at 25.) By that concession, he necessarily concedes that his detention had become constitutional by the time Fackrell searched him. And the arrest "being lawful, a search incident to the arrest" was lawful and

"require[d] no additional justification." *Robinson*, 414 U.S. at 235. In other words, an officer's "authority to search the person incident to a lawful custodial arrest" exists irrespective of "what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id.*

This Court previously refused to apply the exclusionary rule when a flagrantly unlawful arrest (an in-home warrantless arrest) preceded officers' later obtaining a defendant's confession at the police station. *See New York v. Harris*, 495 U.S. 14, 19-20 (1990). The confession "was admissible because" the defendant "was in legal custody"—police *did* have probable cause to arrest him—"and because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else." *Id.* at 20.

If suppression was inappropriate in *Harris*, it is certainly inappropriate here. Not only was Strieff admittedly in legal custody when he was searched, but unlike in *Harris*, the predicate act—Detective Fackrell's investigatory stop—was not flagrantly unlawful. To the best of Utah's knowledge, this Court has never excluded evidence seized in such circumstances. This case is not the time to break that new ground.

CONCLUSION

This Court should reverse the judgment of the Utah Supreme Court.

Respectfully submitted.

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
LAURA B. DUPAIX
Deputy Solicitor General
THOMAS B. BRUNKER
Criminal Appeals Director
JEFFREY S. GRAY
Search & Seizure Section
Director
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@utah.gov
Counsel for Petitioner

**Counsel of Record*

No. 14-1373

In the Supreme Court of the United States

STATE OF UTAH, PETITIONER

v.

EDWARD JOSEPH STRIEFF, JR.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General
DAVID M. LIEBERMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether evidence seized incident to a lawful arrest on a valid warrant is admissible notwithstanding that an officer learned of the outstanding warrant during an unlawful investigatory stop.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 4
Argument:
The evidence seized following respondent's warrant-based arrest is admissible 7
A. Attenuation analysis requires a pragmatic assessment of the relationship between a Fourth Amendment violation and the evidence sought to be suppressed 7
B. Evidence discovered in executing a valid arrest warrant is attenuated from an illegal stop during which an officer learns the identity of the arrestee 14
1. Suppression is unnecessary to vindicate the purpose of the *Terry* rule 15
2. A defendant's identity and evidence derived from his identity are not suppressible 22
C. The societal costs of suppression in this context far outweigh any deterrence benefits 29
Conclusion 34

TABLE OF AUTHORITIES

Cases:

Arizona v. *Evans*, 514 U.S. 1 (1995) 8, 33
Arizona v. *Johnson*, 555 U.S. 323 (2009) 15
Berry v. *Sugar Notch Borough*, 43 A. 240 (Pa. 1899) 17
Brown v. *Illinois*, 422 U.S. 590 (1975) 10, 12, 33
Davis v. *Mississippi*, 394 U.S. 721 (1969) 28, 29
Davis v. *United States*, 131 S. Ct. 2419 (2011) 7, 8, 10
Delaware v. *Prouse*, 440 U.S. 648 (1979) 17

Cases—Continued: Page

Doss v. *Town of Big Stone Gap*, 134 S.E. 563 (Va. 1926) 17
Dunaway v. *New York*, 442 U.S. 200 (1979) 12, 15, 33
Family Serv. Ass'n ex rel. Coil v. *Wells Twp.*, 783 F.3d 600 (6th Cir 2015) 31
Flores v. *JC Penney Corp.*, 256 Fed. Appx. 979 (9th Cir. 2007) 31
Florida v. *Bostick*, 501 U.S. 429 (1991) 30
Frisbie v. *Collins*, 342 U.S. 519 (1952) 24
Goodson v. *City of Corpus Christi*, 202 F.3d 730 (5th Cir. 2000) 31
Hayes v. *Florida*, 470 U.S. 811 (1985) 28, 29
Herring v. *United States*, 555 U.S. 135 (2009) 8, 13, 29, 32
Hiibel v. *Sixth Judicial Dist. Court*, 542 U.S. 177 (2004) 23, 24, 26
Hudson v. *Michigan*, 547 U.S. 586 (2006) ..... *passim*
INS v. *Delgado*, 466 U.S. 210 (1984) 23
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984) 9, 24, 25, 33
Illinois v. *Krull*, 480 U.S. 340 (1987) 8
Illinois v. *Lidster*, 540 U.S. 419 (2004) 31
Illinois v. *Wardlow*, 528 U.S. 119 (2000) 15
Johnson v. *Louisiana*, 406 U.S. 356 (1972) 13, 20
Jones v. *Clark*, 630 F.3d 677 (7th Cir. 2011) 31
Kaupp v. *Texas*, 538 U.S. 626 (2003) 12
Murray v. *United States*, 487 U.S. 533 (1988) 9
Nardone v. *United States*, 308 U.S. 338 (1939) 10, 19
New York v. *Harris*, 495 U.S. 14 (1990) 11, 12, 29
Nix v. *Williams*, 467 U.S. 431 (1984) 9, 25
Payton v. *New York*, 445 U.S. 573 (1980) 11

Cases—Continued: Page

Pennsylvania Bd. of Prob. & Parole v. *Scott*, 524 U.S. 357 (1998) 9, 33, 34
Segura v. *United States*, 468 U.S. 796 (1984) 13, 18, 19, 31
Silverthorne Lumber Co. v. *United States*, 251 U.S. 385 (1920) 9
Stone v. *Powell*, 428 U.S. 465 (1976) 8
Taylor v. *Alabama*, 457 U.S. 687 (1982) 12
Terry v. *Ohio*, 392 U.S. 1 (1968) 3, 14
Turmon v. *Jordan*, 405 F.3d 202 (4th Cir. 2005) 31
United States v. *Calandra*, 414 U.S. 338 (1974) 8, 9
United States v. *Ceccolini*, 435 U.S. 268 (1978) 10, 13, 21
United States v. *Crews*, 445 U.S. 463 (1980) 13, 24
United States v. *Diaz-Castandeda*, 494 F.3d 1146 (9th Cir.), cert. denied, 552 U.S. 1031 (2007) 30
United States v. *Dionisio*, 410 U.S. 1 (1973) 29
United States v. *Friedland*, 441 F.2d 855 (2d Cir.), cert. denied, 404 U.S. 867, and 404 U.S. 914 (1971) 27
United States v. *Green*, 111 F.3d 515 (7th Cir.), cert. denied, 522 U.S. 973 (1997) 18
United States v. *Leon*, 468 U.S. 897 (1984) 8, 10, 29, 33
United States v. *Rodriguez-Arreola*, 270 F.3d 611 (8th Cir. 2001) 25
United States v. *Simpson*, 439 F.3d 490 (8th Cir. 2006) 18
United States v. *Smith*, 155 F.3d 1051 (9th Cir. 1998), cert. denied, 525 U.S. 1071 (1999) 11, 27
United States v. *Watson*, 950 F.2d 505 (8th Cir. 1991) 27
Virginia v. *Moore*, 553 U.S. 164 (2008) 16
Whren v. *United States*, 517 U.S. 806 (1996) 32

Case—Continued: Page

Wong Sun v. *United States*, 371 U.S. 471 (1963) 10, 12, 13, 17, 20, 22

Constitution and statutes:

U.S. Const.:
Amend. IV ..... *passim*
Amend. XIV (Equal Protection Clause) 32
Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 13701 *et seq.*:
42 U.S.C. 14141 ..... 31, 32
42 U.S.C. 1983 30
Utah Code Ann.:
§ 58-37-8(2)(a)(i) (LexisNexis Supp. 2006) 1, 2
§ 58-37a-5(1) (LexisNexis 2002) 1, 2

Miscellaneous:

Dan B. Dobbs et al., *The Law of Torts* (2d ed. 2011) 12, 17

In the Supreme Court of the United States

No. 14-1373

STATE OF UTAH, PETITIONER

v.

EDWARD JOSEPH STRIEFF, JR.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF UTAH

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether evidence seized incident to a lawful arrest pursuant to an outstanding warrant is suppressible because a law-enforcement officer initially detained the defendant without reasonable suspicion. The Court's resolution of that question will affect the admissibility of evidence in federal criminal prosecutions under similar circumstances.

STATEMENT

Following the state trial court's denial of respondent's motion to suppress drug evidence, respondent entered a conditional guilty plea. Respondent was then convicted on one count of attempted possession of a controlled substance, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (LexisNexis Supp. 2006), and one count of possession of drug paraphernalia, in violation of Utah Code Ann. § 58-37a-5(1) (LexisNexis

2002). Pet. App. 6. The court of appeals affirmed. *Id.* at 37-98. The Utah Supreme Court reversed, holding that the trial court had erred in denying respondent's motion to suppress. *Id.* at 1-36.

1. Acting on an anonymous tip, Salt Lake City Police Officer Douglas Fackrell conducted intermittent surveillance of a home suspected of drug activity. Officer Fackrell observed "short term traffic" to and from the home that was, in his opinion, consistent with drug sales. Pet. App. 4. During one period of surveillance, he saw respondent leave the house and walk to a nearby convenience store. Officer Fackrell ordered respondent to stop in the store's parking lot. Officer Fackrell identified himself as a police officer, stated that he had been monitoring the house for drug activity, and asked respondent to explain why he had been at the house. *Id.* at 4-5.

During this exchange, respondent provided, at Officer Fackrell's request, a Utah identification card. Officer Fackrell then asked his dispatcher to determine whether respondent was subject to any outstanding arrest warrants. When the dispatcher reported that respondent was subject to an outstanding warrant for a traffic violation, Officer Fackrell arrested him. Officer Fackrell then searched him and discovered a bag of methamphetamine and drug paraphernalia in his pockets. Pet. App. 5.

2. Respondent was charged in Utah state court with one count of attempted possession of a controlled substance, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (LexisNexis Supp. 2006), and one count of possession of drug paraphernalia, in violation of Utah Code Ann. § 58-37a-5(1) (LexisNexis 2002). Respondent moved to suppress the contraband seized from his

pockets, arguing that it had been obtained in violation of the Fourth Amendment. The State conceded that Officer Fackrell had stopped respondent without reasonable suspicion that respondent was committing or had committed a criminal offense, in violation of the rule of *Terry* v. *Ohio*, 392 U.S. 1 (1968). But the State argued that the evidence was admissible because it was discovered during a search incident to the subsequent lawful arrest based on the preexisting arrest warrant and, therefore, was sufficiently attenuated from the unlawful *Terry* stop to dissipate the taint. Pet. App. 5.

The trial court denied respondent's motion to suppress, holding that Officer Fackrell's discovery that respondent was subject to an outstanding warrant was an "extraordinary intervening circumstance that purges much of the taint associated with [his] unconstitutional conduct." Pet. App. 102 (citation omitted). In the course of its analysis, the trial court found that Officer Fackrell did not commit "a flagrant violation of the Fourth Amendment" in initially stopping respondent, but rather merely made "a good faith mistake" about "the quantum of evidence needed to justify an investigatory detention." *Ibid.*

Respondent entered a conditional guilty plea, reserving the right to challenge the trial court's suppression ruling on appeal. Pet. App. 6. A divided court of appeals affirmed, holding that "the discovery of the preexisting warrant was an intervening circumstance that, coupled with the absence of purposefulness and flagrancy on the part of Officer Fackrell in detaining [respondent], sufficiently attenuated" the taint of the unlawful stop. *Id.* at 83-84; see *id.* at 37-98.

3. The Utah Supreme Court reversed. Pet. App. 1-36. The court explained that "[n]o one is contesting—or even could reasonably contest"—that respondent "was lawfully arrested on an outstanding arrest warrant, and a search incident to arrest was thus also perfectly appropriate." *Id.* at 32 & n.12. But the court concluded that the absence of reasonable suspicion for the initial *Terry* stop required suppression of the evidence seized during the search incident to the arrest. The court rejected the contention that the discovery of the outstanding arrest warrant was an intervening circumstance that attenuated the seizure of the contraband from the *Terry* stop, interpreting this Court's decisions to hold that "attenuation is limited" to cases "involving a defendant's independent acts of free will." *Id.* at 27.

SUMMARY OF ARGUMENT

When an individual is arrested under a preexisting and valid warrant, and evidence is discovered during a lawful search incident to that arrest, the evidence is admissible notwithstanding that the initial stop of the individual was not supported by reasonable suspicion.

A. The purpose of the exclusionary rule is to deter Fourth Amendment violations. But because the exclusionary rule produces substantial societal costs when people who have committed criminal offenses go free, this Court has limited the rule's application to those circumstances where it is most efficacious and least costly. The "attenuation" doctrine is one way in which this Court has restricted the scope of the exclusionary rule. Under that doctrine, even if evidence would not have been discovered but for a Fourth Amendment violation, the evidence is not suppressible if the connection between the violation and the discov-

ery and seizure of the evidence is so attenuated as to dissipate the taint. Attenuation questions cannot be answered in the abstract, but rather require a pragmatic analysis of whether suppression is necessary to vindicate the interest protected by the constitutional guarantee and whether its societal costs outstrip any deterrence benefits.

B. In the situation presented here, the connection between the illegal stop and the discovery of evidence is attenuated. That follows for two related but independently sufficient reasons.

First, the interest protected by the constitutional guarantee at issue—the rule of *Terry* v. *Ohio*, 392 U.S. 1 (1968)—would not be served by suppression of evidence obtained in a search incident to arrest based on a valid, preexisting warrant. The *Terry* rule is designed to protect ordinary citizens from the intrusion on personal privacy of a brief detention and frisk based on officers' unsupported hunches or unreasonable assumptions. That purpose is fully vindicated by suppressing any evidence discovered during those activities. But once an officer learns that an individual is subject to a preexisting arrest warrant, suppressing evidence discovered in a search incident to arrest would far outrun *Terry*'s purpose. In similar contexts, this Court has held that a search pursuant to a valid warrant or other superseding legal authority is attenuated from an antecedent Fourth Amendment violation.

Second, the only information that Officer Fackrell acquired from the unlawful stop—respondent's identity—is not itself information that may be suppressed under the exclusionary rule. It follows that information Officer Fackrell derived from respond-

ent's identity was not tainted by the unlawful stop. Any other rule would threaten to insulate criminal suspects—including, as here, suspects with outstanding arrest warrants—from criminal investigation and apprehension.

C. The costs of suppression in this context far outweigh the deterrence benefits. Law-enforcement officers already face a substantial disincentive to conduct unlawful *Terry* stops, because evidence discovered during questioning or a frisk is suppressible. In addition, officers are subject to numerous other powerful deterrents to conducting random unlawful stops, including internal discipline, civil-rights laws enforced by the Department of Justice, the potential for community hostility, and the inherent safety threat that accompanies any attempt to detain an unknown individual. Any marginal deterrent benefit from excluding evidence lawfully seized incident to a warrant-authorized arrest would not outweigh the considerable costs of applying the exclusionary rule. This case, moreover, does not present the question whether suppression of evidence discovered incident to a lawful arrest on a valid outstanding warrant could be justified to remedy a flagrant violation of the Fourth Amendment, such as a police force's dragnet detention of members of a community on no suspicion, because the district court found that Officer Fackrell made a reasonable mistake in detaining respondent.

ARGUMENT

THE EVIDENCE SEIZED FOLLOWING RESPONDENT'S WARRANT-BASED ARREST IS ADMISSIBLE

As the Utah Supreme Court explained, respondent was lawfully arrested under a valid warrant, and the evidence he seeks to suppress was discovered during a lawful search incident to that arrest. Pet. App. 32. The question here is whether the evidence discovered in that lawful search should nevertheless be suppressed because Officer Fackrell's initial stop of respondent was not justified by reasonable suspicion. Under established attenuation principles, the answer to that question is no.

A. Attenuation Analysis Requires A Pragmatic Assessment Of The Relationship Between A Fourth Amendment Violation And The Evidence Sought To Be Suppressed

1. The Fourth Amendment prohibits unreasonable searches and seizures. Although "[t]he Amendment says nothing about suppressing evidence obtained in violation of [its] command," this Court fashioned the exclusionary rule as "a prudential doctrine * * * to compel respect for the constitutional guaranty." *Davis* v. *United States*, 131 S. Ct. 2419, 2426 (2011) (citations and internal quotation marks omitted). "Exclusion is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search." *Ibid.* (citation and internal quotation marks omitted). Rather, "[t]he rule's sole purpose * * * is to deter future Fourth Amendment violations." *Ibid.* This Court's decisions have therefore "limited the [exclusionary] rule's operation to situations in which this purpose is 'thought most effi-

caciously served.'" *Ibid.* (quoting *United States* v. *Calandra*, 414 U.S. 338, 348 (1974)).

Although "[r]eal deterrent value is a 'necessary condition for exclusion,' * * * it is not 'a sufficient' one." *Davis* v. *United States*, 131 S. Ct. at 2427 (quoting *Hudson* v. *Michigan*, 547 U.S. 586, 596 (2006)). The Court has recognized that the exclusionary rule exacts "'substantial social costs'" because "its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *Ibid.* (quoting *United States* v. *Leon*, 468 U.S. 897, 907 (1984)). The Court has therefore held that "society must swallow this bitter pill when necessary, but only as a 'last resort.'" *Ibid.* (quoting *Hudson*, 547 U.S. at 591). "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Ibid.*

This Court has thus held that the "massive remedy of suppressing evidence," *Hudson*, 547 U.S. at 599, is unwarranted where officers reasonably execute a facially valid search warrant, *Leon*, 468 U.S. at 922; conduct a search in reasonable reliance on binding appellate precedent, *Davis* v. *United States*, 131 S. Ct. at 2423-2324; reasonably rely on a state statute later held unconstitutional, *Illinois* v. *Krull*, 480 U.S. 340, 349-350 (1987); or make an unlawful arrest due to a negligent clerical error, *Herring* v. *United States*, 555 U.S. 135, 136-137, 147-148 (2009); see *Arizona* v. *Evans*, 514 U.S. 1, 14-16 (1995). The Court has conducted a similar "pragmatic analysis of the exclusionary rule's usefulness" in holding that prisoners generally may not obtain habeas relief for Fourth Amendment violations, *Stone* v. *Powell*, 428 U.S. 465, 488 (1976); see *id.* at 494-495, and that the exclusionary rule does

not apply in civil-deportation hearings, *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1040-1050 (1984), grand-jury proceedings, *Calandra*, 414 U.S. at 347-352, or parole-revocation hearings, *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 364 (1998).

2. One way in which this Court has limited the exclusionary rule to circumstances where its deterrence benefits outweigh its societal costs is by requiring a causal connection between the Fourth Amendment violation and the discovery of the evidence sought to be suppressed. The Court has identified two necessary components of that causation requirement.

First, a "necessary * * * condition for suppression" is that the evidence would not have been discovered but for the Fourth Amendment violation. *Hudson*, 547 U.S. at 592. Under the "independent source" doctrine, evidence discovered in an unlawful search will not be suppressed if it was separately acquired through a lawful, independent source. See *Murray* v. *United States*, 487 U.S. 533, 538-539 (1988); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920). A corollary to that principle is the "inevitable discovery" doctrine, which provides that evidence discovered in an unlawful search is not suppressible if it would inevitably have been discovered had the illegal search not occurred. *Murray*, 487 U.S. at 539; see *Nix* v. *Williams*, 467 U.S. 431, 448 (1984). The purpose of those doctrines is to ensure that the exclusionary rule does not "put the police in a worse position than they would have been in absent any error or violation." *Murray*, 487 U.S. at 537 (quoting *Nix*, 467 U.S. at 443).

Second, and as particularly relevant here, this Court has held that "but-for cause, or 'causation in the

logical sense alone,' * * * can be too attenuated to justify exclusion." *Hudson*, 547 U.S. at 592 (quoting *United States* v. *Ceccolini*, 435 U.S. 268, 274 (1978)). Accordingly, once but-for causation is established, a court must further determine "whether, granting establishment of the primary illegality, the evidence * * * has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963) (citation omitted).

That requirement reflects the same basic cost-benefit balancing as this Court's other exclusionary-rule cases. See *Leon*, 468 U.S. at 911. As the Court has explained, "the 'dissipation of the taint' concept * * * 'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.'" *Ibid.* (quoting *Brown* v. *Illinois*, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part)).

3. Once a court finds or assumes a bare causal relationship between a Fourth Amendment violation and the discovery of evidence, the attenuation doctrine requires the court to ask whether that connection is sufficiently close, and the costs sufficiently manageable, to justify suppression in order to deter similar violations in the future. See *Davis* v. *United States*, 131 S. Ct. at 2428-2429. No "talismanic test" for attenuation exists. *Brown*, 422 U.S. at 603. But the Court has explained generally that "[a]ttenuation can occur" either (i) "when the causal connection is remote," *Hudson*, 547 U.S. at 593 (citing *Nardone* v. *United States*, 308 U.S. 338, 341 (1939)), or (ii) "when, even given a direct causal connection, the interest

protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained," *ibid.*

An example of the latter type of attenuation is *New York* v. *Harris*, 495 U.S. 14 (1990). See *Hudson*, 547 U.S. at 593. In *Harris*, law-enforcement officers arrested the defendant in his home without complying with the rule of *Payton* v. *New York*, 445 U.S. 573 (1980), which generally requires a warrant to enter a person's home to arrest him. The Court held that the defendant's subsequent incriminating statement at the stationhouse was attenuated from the illegal arrest because "suppressing the statement taken outside the house would not serve the purpose of the rule that made [the defendant's] in-house arrest illegal": "to protect the home, and anything incriminating the police gathered from arresting [him] in his home, rather than elsewhere." *Harris*, 495 U.S. at 20.

The Court applied a similar analysis in *Hudson* in holding that a violation of the knock-and-announce requirement for the execution of a warrant to search a home does not require suppression of the evidence discovered during the search. 547 U.S. at 593-594. The Court explained that "the knock-and-announce rule has never protected * * * one's interest in preventing the government from seeing or taking evidence described in a warrant." *Id.* at 594. "Since the interests that were violated in this case have nothing to do with the seizure of the evidence," the Court held, "the exclusionary rule is inapplicable." *Ibid.* (emphasis omitted).[1]

---

[1] To the extent that dissipation-of-the-"taint" analysis is "akin to proximate causation analysis" in tort law, *United States* v. *Smith*, 155 F.3d 1051, 1060 (9th Cir. 1998) (O'Scannlain, J.), cert. denied,

4. In several of this Court's attenuation cases, the question was whether a Fourth Amendment violation tainted a post-arrest statement by the defendant (rather than, as here, whether the violation tainted subsequently discovered tangible evidence). See *Kaupp* v. *Texas*, 538 U.S. 626, 632-633 (2003) (per curiam); *Harris*, 495 U.S. at 18-21; *Taylor* v. *Alabama*, 457 U.S. 687, 689-694 (1982); *Dunaway* v. *New York*, 442 U.S. 200, 216-219 (1979); *Brown*, 422 U.S. at 604-605; see also *Wong Sun*, 371 U.S. at 477, 484-487, 491. In *Brown*, the Court rejected the argument that *Miranda* warnings invariably dissipate the taint from an unconstitutional arrest. See 422 U.S. at 591-592, 603-604. The Court held instead that a post-illegal-arrest statement is admissible if it "is the product of a free will," a question that depends on "the facts of each case." *Id.* at 603. The Court explained that "[t]he *Miranda* warnings are an important factor" in that analysis, but that other factors are also "relevant," including "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, * * * and, particularly, the purpose and flagrancy of the official misconduct." *Id.* at 603-604 (footnote and citation omitted).

---

525 U.S. 1071 (1999), the requirement that suppression of particular evidence serve the purpose of the applicable Fourth Amendment rule accords with traditional principles of proximate cause, which "limit[s] the defendant's liability to the kinds of harms he risked by his [wrongful] conduct." Dan B. Dobbs et al., *The Law of Torts* § 198, at 681 (2d ed. 2011) (Dobbs). Imposing liability on the government through suppression of evidence—with its high societal costs—is inappropriate where the government has not discovered evidence "by exploitation of th[e] illegality," *Wong Sun*, 371 U.S. at 488, but has instead relied on means distinguishable from that primary violation.

Brown did not purport to enumerate an exhaustive list of factors relevant to whether a post-illegal-arrest confession was "the product of a free will," let alone an exhaustive list of factors for all attenuation questions. Indeed, contrary to respondent's contention at the certiorari stage (see Br. in Opp. 17-18), this Court has considered attenuation questions involving the suppression of physical evidence rather than confessions, and in those cases the Court has not invoked the *Brown* factors. See *Hudson*, 547 U.S. at 592-594; *Segura* v. *United States*, 468 U.S. 796, 813-816 (1984); *Wong Sun*, 371 U.S. at 487-488. The Court has also concluded that a Fourth Amendment violation did not taint a *witness's* subsequent statement without applying the *Brown* factors. See *Ceccolini*, 435 U.S. at 279-280; see also *Johnson* v. *Louisiana*, 406 U.S. 356, 365 (1972) (pre-*Brown* decision involving lineup identification); cf. *United States* v. *Crews*, 445 U.S. 463, 470-474 (1980). Although some or all of the *Brown* factors are often relevant in particular categories of cases, the overarching attenuation analysis turns on the strength of the causal connection between the Fourth Amendment violation and the evidence acquired, in light of "the interest protected by the constitutional guarantee," *Hudson*, 547 U.S. at 593, and the deterrent purpose and considerable costs of the exclusionary rule.[2]

---

[2] The ultimate inquiry in attenuation cases into deterrent effect weighed against the cost of suppression parallels the ultimate inquiry in cases decided under the good-faith exception to the exclusionary rule. See, *e.g.*, *Herring*, 555 U.S. at 141-142 (discussing balance of deterrence and costs). There, the absence of flagrant or culpable conduct means that the deterrent purpose of the exclusionary rule will not be served. See *id.* at 144 ("exclusionary

B. Evidence Discovered In Executing A Valid Arrest Warrant Is Attenuated From An Illegal Stop During Which An Officer Learns The Identity Of The Arrestee

In this case, Officer Fackrell learned during the unlawful *Terry* stop that respondent was the subject of an outstanding arrest warrant and then discovered contraband incident to arresting him. See *Terry* v. *Ohio*, 392 U.S. 1 (1968). The most immediate cause of the discovery of the contraband was not the illegal *Terry* stop, but rather the "subsequent search pursuant to a lawful [arrest] warrant," *Hudson*, 547 U.S. at 604 (Kennedy, J., concurring in part and concurring in the judgment), which was issued before the *Terry* stop based on a judge's finding of probable cause. Nevertheless, the *Terry* stop may have been a "but-for" cause of the discovery of the evidence. Because Officer Fackrell did not recognize respondent on sight, he would not have learned of the warrant but for the *Terry* stop. And if the arrest warrant had been executed by a different officer at a later time, respondent might not have been carrying the contraband. Pet. App. 32-33.

But while the *Terry* stop may have borne a basic causal connection to the discovery of the evidence, the discovery was sufficiently attenuated from the *Terry* stop to dissipate the taint. That follows for two related but independently sufficient reasons. First, the possibility that an officer will execute a valid, preexisting arrest warrant and conduct a search incident to

---

rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence"). In attenuation cases, the existence of a weak causal connection between a violation and evidence produces the same conclusion. Both inquiries must be satisfied to justify suppression.

arrest is not within the scope of the constitutional harms that the *Terry* rule is designed to prevent. Second, the only relevant information that Officer Fackrell obtained from the *Terry* stop was respondent's identity, and it has long been established that a person's identity and information derived from his identity are not suppressible.

1. Suppression is unnecessary to vindicate the purpose of the Terry *rule*

Under the attenuation principles outlined above, even if a Fourth Amendment violation bears "a direct causal connection" to the discovery of evidence, "[a]ttenuation * * * occurs when * * * the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Hudson*, 547 U.S. at 593. That is the case here.

a. *Terry* permits an officer to briefly detain a person for questioning without probable cause "when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense" and to frisk the person for weapons when the officer "reasonably suspect[s] that the person stopped is armed and dangerous." *Arizona* v. *Johnson*, 555 U.S. 323, 326-327 (2009). *Terry* strikes a balance between officers' investigative and safety needs and the interests of citizens in avoiding a brief detention and a frisk. See *Dunaway*, 442 U.S. at 209-210. The basic premise of *Terry* is that a citizen should be free "to ignore the police and go about his business" unless officers have at least an objectively reasonable suspicion that he is involved in criminal activity. *Illinois* v. *Wardlow*, 528 U.S. 119, 125 (2000).

It follows that where an officer does not have reasonable suspicion yet detains a citizen who should have been free to "go about his business," any evidence discovered in the course of the detention—for example, during a frisk—is suppressible (absent an applicable exception to the exclusionary rule). Such evidence is exposed to the government only because the officer conducted a search that the Fourth Amendment forbids. Application of the exclusionary rule in that circumstance therefore aligns suppression with the basic purpose of the *Terry* doctrine: to prevent the police from stopping and frisking citizens based only on unsupported hunches or unreasonable assumptions.

Once it is determined that a person has an outstanding arrest warrant, however, the calculus changes and *Terry*'s basic purposes are no longer implicated. *Terry* is not designed to prevent officers from making valid arrests on outstanding warrants issued because of independent probable cause. Nor is it designed to limit post-arrest searches to ensure officer safety and preserve evidence. See *Hudson*, 547 U.S. at 593 (once "a valid warrant has issued," the subject of the warrant is no longer "entitled to shield [his] person[] * * * from the government's scrutiny") (citation and internal quotation marks omitted); see also *Virginia* v. *Moore*, 553 U.S. 164, 176-177 (2008) ("The interests justifying search are present whenever an officer makes an arrest.").

The *Terry* doctrine, in other words, does not protect against the possibility that an officer without reasonable suspicion will come across an individual who, unbeknownst to the officer, is already subject to a judicial command that he be apprehended and a

corresponding authorization for his person to be searched. Rather, *Terry* protects liberty and privacy interests that the government has no constitutional authority to disturb without reasonable suspicion or consent. See *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979). But the existing warrant already provides a valid basis for intruding on a person's liberty and privacy interests. Accordingly, suppressing evidence acquired in a post-arrest search incident to a valid warrant-authorized arrest, simply because the particular officer did not know of the warrant beforehand but learned of it only by virtue of the stop, would far outstrip the purpose of *Terry*'s rule.[3]

Thus, as in *Harris* and *Hudson*, this is a circumstance in which "the interest protected by the constitutional guarantee" of *Terry* "would not be served by suppression of the evidence obtained." *Hudson*, 547 U.S. at 593. The purpose of the *Terry* rule is to protect ordinary citizens from brief detentions and frisks,

---

[3] The government cannot be said to have "exploit[ed]" the stop to justify the arrest, *Wong Sun*, 371 U.S. at 488; the outstanding warrant justified the arrest. The connection between the two in this situation resembles hornbook tort cases in which a violation of a legal duty is causally connected to a resulting harm purely by happenstance, such as where "the defendant is negligent in driving a vehicle at high speed and because of the speed arrives at a spot just in time to be struck by a large tree that falls or an airplane that crashes." Dobbs § 205, at 710 (citing *Berry* v. *Sugar Notch Borough*, 43 A. 240 (Pa. 1899); and *Doss* v. *Town of Big Stone Gap*, 134 S.E. 563 (Va. 1926)). In such cases, the traditional rule is that "the defendant is not liable for injuries resulting in this manner" because "it is not a risk enhanced or created by the defendant's conduct." *Id.* at 710-711. The same holds true here: The risk of arrest, and discovery of evidence, was not enhanced by the unlawful *Terry* stop. The same arrest and discovery of evidence could have occurred in any other execution of the warrant.

and the rule is fully vindicated by suppressing evidence discovered in the course of those activities. Suppressing evidence found in lawful searches incident to arrests on preexisting warrants, by contrast, would impose substantial societal costs without any real connection to the purpose of the *Terry* rule.

b. Some lower courts that have found attenuation in similar circumstances have relied on the second "*Brown* factor" (see pp. 12-13, *supra*), holding that a lawful arrest under an outstanding arrest warrant "constitute[s] an intervening circumstance sufficient to dissipate any taint caused by the illegal * * * stop." *United States* v. *Green*, 111 F.3d 515, 521-522 (7th Cir.), cert. denied, 522 U.S. 973 (1997); see, *e.g.*, *United States* v. *Simpson*, 439 F.3d 490, 495-497 (8th Cir. 2006). Those conclusions comport with the analysis set forth above: Once it is determined during a *Terry* stop that independent, preexisting legal authority exists to arrest and search the defendant, suppression would no longer serve *Terry*'s purposes.

That conclusion is also consistent with this Court's attenuation determinations in analogous circumstances. For example, in *Segura*, law-enforcement officers illegally entered an apartment and waited there for 19 hours while a search warrant was obtained. 468 U.S. at 800-801, 814-815. The Court held that the evidence discovered in executing the warrant was not suppressible because the warrant was based on information known to the officers before the entry. *Id.* at 801, 814. The dissent argued that "the initial entry and securing of the premises [were] the 'but for' causes of the discovery of the evidence in that, had the agents not entered the apartment, but instead secured the premises from the outside, [the occupants,] if alerted, could

have removed or destroyed the evidence before the warrant issued." *Id.* at 815; see *id.* at 831-836 (Stevens, J., dissenting). In response, the Court agreed that "the agents' actions could be considered the 'but for' cause for discovery of the evidence," but rejected that causal connection as a sufficient basis to invoke the exclusionary rule. *Id.* at 816. The Court invoked "Justice Frankfurter's warning" that although "'[s]ophisticated argument may prove a causal connection between information obtained through [illegal conduct] and the Government's proof,' * * * courts should consider whether '[a]s a matter of good sense . . . such connection may have become so attenuated as to dissipate the taint.'" *Ibid.* (brackets in original) (quoting *Nardone*, 308 U.S. at 341).

Segura supports an attenuation finding here. As in *Segura*, although the Fourth Amendment violation may have been a but-for cause of the discovery of the evidence, the search that ultimately uncovered the evidence was supported by a warrant based on independent probable cause. Indeed, the case for attenuation is stronger in this case, because in *Segura* the seizure of the apartment was objectively designed to prevent the destruction of evidence pending execution of the warrant, whereas here the *Terry* stop was not objectively designed to ensure that any search incident to the execution of the then-unknown arrest warrant would turn up contraband. And in this case, unlike in *Segura*, the warrant providing legal authority for the search *predated* the Fourth Amendment violation, further diluting the connection between the violation and the evidence. See *Hudson*, 547 U.S. at 600-601 (opinion of Scalia, J.).

The Court's decisions in *Hudson* and *Johnson* v. *Louisiana* similarly held that superseding legal authority dissipates the taint from a Fourth Amendment violation. In *Hudson*, the knock-and-announce violation preceded the search and thus could have prevented the defendants from destroying the drug evidence ultimately seized. See U.S. Amicus Br. at 14 n.5, *Hudson*, *supra* (No. 04-1360). But the Court nevertheless concluded that, for the purposes of the exclusionary rule, the "evidence was discovered not because of a failure to knock and announce, but because of a subsequent search pursuant to a lawful warrant." 547 U.S. at 604 (Kennedy, J., concurring in part and concurring in the judgment); see *id.* at 590-594 (majority opinion).

Likewise, in *Johnson* v. *Louisiana*, the Court rejected the defendant's argument that his in-home warrantless arrest tainted a witness's subsequent identification of him in a lineup, relying on the fact that before the lineup the defendant had been "brought before a committing magistrate to advise him of his rights and set bail." 406 U.S. at 365; see *id.* at 358. As a result, the Court held, his detention "[a]t the time of the lineup * * * was under the authority of this commitment" and, therefore, not "the fruit of [the] illegal entry and arrest." *Id.* at 365. The lineup thus "was conducted not by 'exploitation' of the challenged arrest but 'by means sufficiently distinguishable to be purged of the primary taint.'" *Ibid.* (quoting *Wong Sun*, 371 U.S. at 488).

Like *Segura*, both *Hudson* and *Johnson* v. *Louisiana* support the view that an officer's acquisition or recognition of independent, valid legal authority to conduct a search or seizure vitiates the connection

between a preceding Fourth Amendment violation and any subsequently obtained evidence. And that conclusion is consistent with the basic purposes of the *Terry* rule, which are no longer served once an officer begins acting pursuant to separate, valid legal authority to conduct an arrest and search.

c. The Utah Supreme Court rested its contrary decision on the view that "attenuation should be limited to cases involving intervening acts of a defendant's free will." Pet. App. 35. That holding was clearly wrong. As discussed (see pp. 18-21, *supra*), in *Johnson* v. *Louisiana*, *Segura*, and *Hudson*, the discovery of the evidence was held attenuated because of the acquisition or execution of superseding legal authority permitting a search, not because of any act of free will by the defendant. And in *Ceccolini*, where the Court held that a witness's testimony was sufficiently attenuated from the Fourth Amendment violation that led police to the witness, no intervening change in free will occurred, nor any change by the defendant. Rather, the Court relied on the proposition that the witness's testimony "was an act of her own free will in no way coerced or even induced by official authority." 435 U.S. at 279.

Nor does it make practical sense to limit attenuation to intervening acts of a defendant's free will. Given that causal relationships can, domino-like, extend far beyond the initial event, it would be extraordinarily harmful to society if a Fourth Amendment violation tainted the discovery of any evidence causally related to the violation unless the defendant committed an act of intervening free will.

The Utah Supreme Court also feared that application of the attenuation doctrine in this case would

render the inevitable-discovery exception irrelevant. Pet. App. 31-34. That concern was misplaced. The inevitable-discovery doctrine is one application of the threshold suppression requirement that the Fourth Amendment violation be a "but for" cause of the discovery of the evidence. See p. 9, *supra*. But once a court finds that evidence might not have been discovered absent the illegal action, it must conduct the further attenuation inquiry. *Wong Sun*, 371 U.S. at 487-488. That sequence presupposes that certain evidence that would *not* inevitably have been discovered nevertheless will be found attenuated from the Fourth Amendment violation.

Moreover, applying the attenuation doctrine in the circumstances of this case does not render the inevitable-discovery doctrine irrelevant, even in the context of *Terry* violations. For example, suppose that Officer Fackrell had frisked respondent and found an illegal firearm, but that another officer had been on his way to arrest respondent on an outstanding warrant. In that circumstance, the discovery of the evidence would not be attenuated from the illegal frisk, but the government could argue that the firearm would inevitably have been discovered by the other officer during a search incident to arrest. The question would thus be resolved under the inevitable-discovery doctrine, not the attenuation doctrine.

2. A defendant's identity and evidence derived from his identity are not suppressible

The contraband that Officer Fackrell discovered in the search incident to arrest was attenuated from the unlawful *Terry* stop for another reason: The only information that he obtained from the stop was respondent's identity, which then led Officer Fackrell to

the preexisting arrest warrant in the police department's records. Unlike, for example, a firearm found during an illegal frisk, respondent's identity was not itself suppressible. As this Court and lower courts have long recognized, a suspect's identity is so fundamental to all criminal investigation and prosecution, and so readily obtainable through lawful means, that the deterrence benefits from applying the exclusionary rule to suppress identity information that happens to be discovered in an unlawful search or seizure is not justified in light of its tremendous costs. And it is an inherent precept of attenuation doctrine that evidence derived exclusively from untainted evidence, such as identity information, is not tainted either. Accordingly, because the only link between the illegal *Terry* stop and the discovery of the drug evidence was respondent's identity, the drug evidence is not suppressible.

a. A person's identity is a crucial part of any encounter he has with the criminal-justice system. When police suspect someone of criminal activity, they are likely to pose "questions concerning [the] suspect's identity [as] a routine and accepted part" of any investigatory stop. *Hiibel* v *Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004). Even absent suspicious criminal activity, officers may still ask individuals about their identity or for identification without implicating the Fourth Amendment. See *INS* v. *Delgado*, 466 U.S. 210, 216 (1984). At the initial investigatory stage, the officers' knowledge of the individual's identity serves critical interests. Knowing that "a suspect is wanted for another offense, or has a record of violence or mental disorder," for example, can alert

the officer to the need to call for backup or to take additional safety measures. *Hiibel*, 542 U.S. at 186.

When the interaction with law-enforcement officers results in arrest and criminal prosecution, the suspect's identity becomes a foundational element of the judicial proceedings. "In every criminal case," the Court has explained, "it is known and must be known who has been arrested and who is being tried." *Hiibel*, 542 U.S. at 191. That is true regardless of whether the initial arrest that resulted in bringing the suspect before the court conformed to the requirements of the Fourth Amendment. See *Crews*, 445 U.S. at 474.

In light of the importance of a suspect's identity for criminal investigations and prosecutions, this Court has long held that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." *Lopez-Mendoza*, 468 U.S. at 1039; see *Crews*, 445 U.S. at 479 (White, J., concurring in the result) ("[A] majority of the Court agrees that the rationale of *Frisbie* [v. *Collins*, 342 U.S. 519 (1952),] forecloses the claim that respondent's face can be suppressible as a fruit of the unlawful arrest."). That principle has two components. First, a court may exercise *jurisdiction* over a person who has been unlawfully arrested. See *Lopez-Mendoza*, 468 U.S. at 1039-1040. Second, *evidence* of a person's identity is not suppressible.

The Court made the latter point clear in *Lopez-Mendoza*, which held that the exclusionary rule does not apply to evidence introduced in civil-deportation proceedings. See 468 U.S. at 1040-1050. In reaching that conclusion, the Court determined that applying the exclusionary rule in those proceedings would have

little deterrence benefit. As relevant here, the Court explained that in many deportation proceedings "the sole matters necessary for the Government to establish are the respondent's identity and alienage," and "*the person and identity of the respondent are not themselves suppressible.*" *Id.* at 1043 (emphasis added; citation omitted). Although some lower courts have understood that statement to refer only to a court's jurisdiction over a defendant, *e.g.*, *United States* v. *Rodriguez-Arreola*, 270 F.3d 611, 617-619 (8th Cir. 2001), that is incorrect. In the passage containing the quoted statement, this Court rejected a request by an alien to suppress evidence at his deportation proceeding, 468 U.S. at 1040, and it reasoned that even if the exclusionary rule applied, only limited forms of evidence could be suppressed as a consequence of an unlawful arrest, identity evidence not being among them, *id.* at 1043. The nonsuppressibility of identity evidence was thus integral to the Court's holding.

It follows that any evidence that law-enforcement officers derive from the bare fact of a suspect's identity is not suppressible either. To the government's knowledge, this Court has never required the suppression of evidence found solely through the otherwise lawful use of information or material that is not itself suppressible. That makes sense: Logic suggests that the lawful use of admissible evidence to procure further admissible evidence is permissible. The fruit-of-the-poisonous-tree doctrine requires a tainted branch, and if a branch is not tainted, its fruit is not forbidden.

For example, no one would reasonably contend that evidence derived from other evidence acquired under

a search warrant after a knock-and-announce violation is suppressible. Because the initially acquired evidence is not itself suppressible under *Hudson*, any further evidence derived from the evidence is also untainted. Likewise, because a stationhouse confession following a *Payton* violation is not itself tainted under *Harris*, any evidence that law-enforcement officers derive from the confession—for example, by securing a warrant to search the home—is not suppressible either. Under the same principle, when officers use the knowledge of an individual's identity, which cannot be suppressed, to discover additional evidence, that evidence is not tainted.

b. The conclusion that neither a defendant's identity, nor evidence derived from his identity, is suppressible is supported by the cost-benefit analysis that this Court's exclusionary-rule precedents mandate. Suppressing evidence derived from illegally obtained identity information is unlikely to have appreciable deterrence benefits. Once law-enforcement officers ascertain a suspect's identity, they typically must engage in substantial further investigative work to discover inculpatory evidence. See *Hiibel*, 542 U.S. at 191. For that reason, in most cases, the "causal connection" between a suspect's identity and the evidence sought to be suppressed will be too "remote" to warrant suppression. *Hudson*, 547 U.S. at 593. Moreover, officers have many lawful ways to determine a person's identity, such as asking neighbors or landlords. See p. 30, *infra*. It is therefore not plausible that suppression of identity evidence that happens to be discovered during a Fourth Amendment violation, like the illegal *Terry* stop here, or evidence derived

from such identity evidence, will materially increase deterrence.

That minimal deterrence benefit is vastly outweighed by the societal costs of holding that illegally acquired identity information taints evidence discovered in a subsequent investigation. Courts of appeals have consistently held that the fact that an individual's identity was learned during an unlawful search did not taint evidence discovered during the investigation of that individual. See *United States* v. *Smith*, 155 F.3d 1051, 1062-1063 (9th Cir. 1998), cert. denied, 525 U.S. 1071 (1999); *United States* v. *Watson*, 950 F.2d 505, 507-508 (8th Cir. 1991); *United States* v. *Friedland*, 441 F.2d 855, 859-861 (2d Cir.), cert. denied, 404 U.S. 867, and 404 U.S. 914 (1971). Indeed, even when police have discovered both an individual's identity and links to criminal activity in an illegal search, courts have declined to suppress the fruits of later investigation. As Judge Friendly explained in the seminal Second Circuit decision addressing that issue, it "would stretch the exclusionary rule beyond tolerable bounds" to "grant life-long immunity from investigation and prosecution simply because a violation of the Fourth Amendment first indicated to the police that a man was not the law-abiding citizen he purported to be." *Friedland*, 441 F.2d at 861.

That analysis applies with special force in the situation here. The only relevant fact that the police obtained in the stop leading to respondent's arrest was his identity; law-enforcement officers had already developed probable cause against respondent before Officer Fackrell learned his identity. The illegal stop thus did not even lead to the investigation justifying respondent's arrest. Rather, it merely provided a

means of determining that he was subject to being arrested and searched under the preexisting warrant. It would not serve the purposes of the exclusionary rule to hold that a search incident to an arrest that culminated from a lawful, prior investigation is tainted merely because the arresting officer learned the suspect's identity during an unlawful *Terry* stop.

c. In *Davis* v. *Mississippi*, 394 U.S. 721 (1969), and *Hayes* v. *Florida*, 470 U.S. 811 (1985), the police, after interviewing dozens of other young males in connection with suspected sexual assaults, detained the defendants without a warrant or probable cause for the purpose of fingerprinting them and linking them to a specific crime by comparing their fingerprints to those found at the crime scene. See *Davis* v. *Mississippi*, 394 U.S. at 722-723; *Hayes*, 470 U.S. at 812-813. This Court held that the detentions violated the Fourth Amendment and that the fingerprints were suppressible fruits of that violation. *Davis* v. *Mississippi*, 394 U.S. at 723-728; *Hayes*, 470 U.S. at 813-818.

Although a person's fingerprints are a form of identity evidence, *Davis* and *Hayes* do not undercut the principle that identity information, and evidence derived from identity information, is generally not suppressible. In *Davis* and *Hayes*, the identities of the defendants were already known to the authorities. The fingerprints therefore were not being used to identify the defendants, but rather as inculpatory evidence to link the defendants to a crime scene. That presents an entirely different question than cases in which officers use fingerprints to identify a suspect, where the fingerprints may have been taken during an unlawful arrest or detention. In such cases, under this Court's post-*Davis* decision in *Lopez-Mendoza*,

the suspect's identity is not suppressible merely because it was derived from fingerprinting that took place during an illegal detention.[4]

C. The Societal Costs Of Suppression In This Context Far Outweigh Any Deterrence Benefits

A pragmatic analysis of the costs and benefits of suppressing evidence further confirms that "the extreme sanction of exclusion," *Herring*, 555 U.S. at 140 (quoting *Leon*, 468 U.S. at 916), is not warranted here.

1. Suppressing evidence from a search incident to a warrant-authorized arrest would not result in appreciable marginal deterrence of *Terry* violations. Law-enforcement officers already face a substantial deterrent to unlawful *Terry* stops: Absent some other exception to the exclusionary rule, statements made during an unlawful stop and evidence discovered through an unlawful frisk are suppressible. As with the *Payton* rule in *Harris*, "the principal incentive to obey [*Terry*] still obtains," *Harris*, 495 U.S. at 20,

---

[4] *Davis* v. *Mississippi* involved "dragnet" arrests of multiple individuals without any objective basis for individualized suspicion, 394 U.S. at 728 (Harlan, J., concurring); see *United States* v. *Dionisio*, 410 U.S. 1, 5 (1973), and *Hayes* involved a wholly unjustified arrest and transportation of a suspect to the stationhouse for the sole purpose of taking an investigatory set of fingerprints, 470 U.S. at 812. The flagrancy of that conduct further distinguishes it from a case like this, involving an officer's misjudgment about the existence of reasonable suspicion on a particular set of facts. See *Herring*, 555 U.S. at 143 ("[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus of applying the exclusionary rule.") (citation and internal quotation marks omitted); see also pp. 32-33, *infra*. The Court therefore need not consider whether the holdings of *Davis* and *Hayes* should be reassessed or limited in light of the principles of its more recent exclusionary-rule precedents.

even if evidence discovered incident to valid warrant-based arrests is not suppressible. In most cases, an officer's reason for detaining a citizen is to ask questions about potential criminal activity, or possibly to perform a frisk that might turn up weapons or contraband. Suppressing that evidence directly deters unfounded stops. It is not plausible that officers will, nonetheless, frequently conduct such stops on the off-chance that a warrant might turn up and permit a search incident to arrest.

An officer bent on learning whether an individual has an outstanding warrant has easier options at her disposal. She could ask the person his name without requiring him to stop. See *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991). She could follow the individual to his home, place of employment, or car, record the address or license plate, and check that information against a warrant database. She could ask neighbors, a landlord, or coworkers. None of those strategies violates the Fourth Amendment. See *United States* v. *Diaz-Castaneda*, 494 F.3d 1146, 1150-1152 (9th Cir.) (collecting cases holding that database check of license plate is not a search under the Fourth Amendment), cert. denied, 552 U.S. 1031 (2007).

Other factors also deter officers from conducting random, arbitrary stops. *Terry* stops can be dangerous for officers, which is why they may perform a frisk if they have reasonable suspicion that someone is armed. In addition, officers who detain citizens without justification face civil liability through Section 1983 or *Bivens* suits, which this Court has found to have emerged recently as "an effective deterrent." *Hudson*, 547 U.S. at 598. As with the knock-and-announce suits that this Court pointed to in *Hudson*,

see *ibid.*, lowers courts have entertained a number of suits based on alleged *Terry* violations. See, *e.g.*, *Family Serv. Ass'n ex rel. Coil* v. *Wells Twp.*, 783 F.3d 600, 603-605 (6th Cir. 2015); *Jones* v. *Clark*, 630 F.3d 677, 682-684 (7th Cir. 2011); *Flores* v. *JC Penney Corp.*, 256 Fed. Appx. 979, 980-981 (9th Cir. 2007); *Turmon* v. *Jordan*, 405 F.3d 202, 205-206 (4th Cir. 2005); *Goodson* v. *City of Corpus Christi*, 202 F.3d 730, 739-740 (5th Cir. 2000). The Department of Justice also has authority to conduct investigations of unlawful patterns or practices by police departments of conducting stops without reasonable suspicion, and its actions can lead to institutional reform and monitoring. See 42 U.S.C. 14141.

2. It might be argued that that without suppression in this context, law-enforcement officers would be encouraged to conduct random, dragnet *Terry* stops in neighborhoods where a large number of citizens are subject to outstanding arrest warrants. This Court, however, has rejected the argument that refraining from suppressing evidence when it is attenuated will encourage blatantly lawless conduct. See *Hudson*, 547 U.S. at 597-599. And in *Segura*, Chief Justice Burger, joined by Justice O'Connor, rebuffed a claim that refusing to suppress evidence when officers unlawfully secure a home from the inside would "heighten the possibility of illegal entries," noting that "[w]e are unwilling to believe that officers will routinely and purposely violate the law as a matter of course." 468 U.S. at 811-812 (opinion of Burger, C.J.). Moreover, such flagrantly unlawful actions can only engender "community hostility" and thus undermine efforts to prevent and solve crimes. *Illinois* v. *Lidster*, 540 U.S. 419, 426 (2004).

Even if a "widespread pattern" of blatantly unconstitutional tactics were to emerge, *Hudson*, 547 U.S. at 604 (Kennedy, J., concurring in part and concurring in the judgment), the civil-rights laws would likely provide effective remedies against egregious policies or practices, see *id.* at 597-598 (majority opinion). While the Fourth Amendment, and the exclusionary rule adopted under it, turn on objective factors, and not on an officer's subjective state of mind, see *Whren* v. *United States*, 517 U.S. 806, 813 (1996); see also *Herring*, 555 U.S. at 143, the Equal Protection Clause "prohibits selective enforcement of the law based on considerations such as race" and provides a "constitutional basis for objecting to intentionally discriminatory application of laws," *Whren*, 517 U.S. at 813. The lower courts did not find that such conduct occurred in this case. But if law-enforcement officers were to engage in pretextual or intentional errors, the Department of Justice would have the authority under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C 14141, to address such impermissible or discriminatory tactics. Indeed, the Department has negotiated consent decrees with police departments to ensure that *Terry* and similar stops of individuals are not undertaken for intentionally impermissible reasons. See, *e.g.*, Consent Decree Regarding the New Orleans Police Dep't, Docket entry No. 2-1, at 38, *United States* v. *City of New Orleans*, No. 2:12-cv-01924 (E.D. La. July 24, 2012).

In any event, the concern that officers might conduct blatantly unconstitutional stops in the hope of discovering outstanding arrest warrants would at most justify reserving the question whether suppression would be warranted if the discovery of an out-

standing warrant were the result of a flagrant violation of *Terry*, a factor that this Court has cited in some attenuation contexts. See *Leon*, 468 U.S. at 911 (citing *Brown*, 422 U.S. at 603-604; and *Dunaway*, 442 U.S. at 218). Here, the trial court and the court of appeals correctly found that Officer Fackrell did not commit "a flagrant violation of the Fourth Amendment." Pet. App. 102; see Pet. Br. 29-32. As the court of appeals explained, Officer Fackrell relied on an "anonymous tip about drug activity [that] had been corroborated to some extent by [his] personal observations" of the house from which respondent emerged, and his purpose in stopping respondent was to "further investigate what was going on inside the house." Pet. App. 69-70. His actions "amounted to a misjudgment" about whether the reasonable-suspicion standard was met, not a "knowing or obvious disregard of constitutional limitations." *Id.* at 70-71. This case thus does not provide an occasion to consider whether suppression would be appropriate for a flagrant *Terry* violation. Cf. *Lopez-Mendoza*, 468 U.S. at 1050-1051 (opinion of O'Connor, J.).

3. The "marginal or nonexistent benefits produced by suppressing evidence" in this context "cannot justify the substantial costs of exclusion." *Evans*, 514 U.S. at 12 (quoting *Leon*, 468 U.S. at 922). This Court has long recognized "the grave adverse consequence that exclusion of relevant incriminating evidence always entails." *Hudson*, 547 U.S. at 595. Excluding evidence "detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions," *Scott*, 524 U.S. at 364, with the "risk of releasing dangerous criminals into society," *Hudson*, 547 U.S. at 595.

Respondent's proposed rule would not distinguish an individual with an outstanding warrant for a traffic violation from an individual with an outstanding warrant for armed robbery, and it would exclude even especially critical evidence found during a search incident to arrest, such as a firearm or drug ledger. Particularly given that exclusion of evidence "has always been [this Court's] last resort, not [its] first impulse," *id.* at 591, applying the exclusionary rule to evidence discovered in a lawful search incident to arrest to remedy an antecedent *Terry* violation is not warranted. In that circumstance, "the rule's costly toll upon truth-seeking and law enforcement objectives" overwhelm whatever marginal deterrent value would be achieved. *Scott*, 524 U.S. at 364-365 (citation and internal quotation marks omitted).

CONCLUSION

The judgment of the Supreme Court of Utah should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General
DAVID M. LIEBERMAN
Attorney

DECEMBER 2015

No. 14-1373

In the Supreme Court of the United States

STATE OF UTAH,

Petitioner,

v.

EDWARD JOSEPH STRIEFF, JR.,

Respondent.

On Writ of Certiorari to the Supreme Court of Utah

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10025
(212) 549-2500

JEFFREY L. FISHER
Co-Chair, NACDL Amicus Committee
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

MICHAEL B. KIMBERLY
Counsel of Record
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
mkimberly@mayerbrown.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Table of Authorities ii

Interest of the *Amici Curiae* 1

Introduction and Summary of Argument 2

Argument 4

The evidence was correctly excluded for reasons that are distinct from, but related to, deterrence 4

A. The exclusionary rule serves purposes other than deterrence alone 4

1. Judicial integrity is an important factor in the balance of benefits and burdens 5

2. Restoration of the status quo ante is likewise an important consideration 8

B. The rule's alternative rationales help explain why suppression would deter violations like the one in this case 10

C. The social costs of suppression do not outweigh the considerations favoring it 16

Conclusion 18

TABLE OF AUTHORITIES

Cases

Anderson v. *Creighton*,
483 U.S. 635 (1987) 14

Boyd v. *United States*,
116 U.S. 616 (1886) 13

Brown v. *Illinois*,
422 U.S. 590 (1975) 7, 8

Davis v. *United States*,
131 S. Ct. 2419 (2011) ..... *passim*

Dunaway v. *New York*,
442 U.S. 200 (1979) 10

Elkins v. *United States*,
364 U.S. 206 (1960) 4, 5, 7, 11

Golphin v. *State*,
945 So. 2d 1174 (Fla. 2006) 15

Harrison v. *United States*,
392 U.S. 219 (1968) 7, 8

Herring v. *United States*,
555 U.S. 135 (2009) 4, 12

Hudson v. *Michigan*,
547 U.S. 586 (2006) 4

Illinois v. *Krull*,
480 U.S. 340 (1987) 4

Illinois v. *Wardlow*,
528 U.S. 119 (2000) 16

Mapp v. *Ohio*,
367 U.S. 643 (1961) 5, 6, 7, 8

Cases—continued

Nix v. *Williams*,
467 U.S. 431 (1984) 9

Offutt v. *United States*,
348 U.S. 11 (1954) 6

Schneckloth v. *Bustamonte*,
412 U.S. 218 (1973) 13

State v. *Marland*,
112 P.3d 507 (Utah 2005) 15

Terry v. *Ohio*,
392 U.S. 1 (1968) ..... *passim*

United States v. *Calandra*,
414 U.S. 338 (1974) 4

United States v. *Johnson*,
457 U.S. 537 (1982) 11, 16

United States v. *Lopez*,
443 F.3d 1280 (10th Cir. 2006) 15

United States v. *Peltier*,
422 U.S. 531 (1975) 7

Weeks v. *United States*,
232 U.S. 383 (1914) 5, 6

Williams-Yulee v. *The Florida Bar*,
135 S. Ct. 1656 (2015) 6

Wong Sun v. *United States*,
371 U.S. 471 (1963) 8

Other Authorities

Craig M. Bradley, *Murray v. United States: The Bell Tolls for the Search Warrant Requirement*, 64 Ind. L.J. 907 (1989) 9

Comment, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 Yale L.J. 177 (2008)....9, 10, 14

Ctr. for Constitutional Rights, *Stop and Frisk: The Human Impact* (July 2012).....13

Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 Wake Forest L. Rev. 261 (1998).....8

N.Y. Civil Liberties Union, Press Release, *Analysis Finds Racial Disparities, Ineffectiveness in NYPD Stop-and-Frisk Program*, May 22, 2013.....13

Wendy Ruderman, *For Women in Street Stops, Deeper Humiliation*, N.Y. Times, Aug. 6, 2012.....17

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In furtherance of those principles, the ACLU has appeared in numerous cases before this Court involving the meaning and scope of the Fourth Amendment, both as direct counsel and as amicus. Because this case directly implicates those issues, its proper resolution is a matter of concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL), a nonprofit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. Founded in 1958, NACDL has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just

---

[1] No counsel for a party authored this brief in whole or in part. No person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Letters from both parties consenting to the filing of this brief have been lodged with the Clerk.

administration of justice, including the administration of criminal law.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, NACDL frequently appears as amicus in cases involving the Fourth Amendment, speaking to the importance of balancing core constitutional search and seizure protections with other constitutional and societal interests.

INTRODUCTION AND SUMMARY OF ARGUMENT

No one denies that the evidence at issue in this case—the fruit of an unlawful *Terry* stop—is subject to the exclusionary rule unless the rule's "attenuation exception" applies. As respondent persuasively demonstrates in his brief, the attenuation exception does not apply here. In light of the close logical and temporal connection between the unlawful stop, the discovery of the warrant, and the search incident to arrest, the taint of the Fourth Amendment violation in this case has not in any sense dissipated. Embedded in the attenuation analysis is a more fundamental question: whether the costs of suppressing the evidence in this case outweigh the benefits. They do not.

Petitioner and the United States both take the position that the only benefit of suppression that matters here is deterrence—but they are wrong. Other rationales underlying the exclusionary rule

also inform the suppression analysis, including safeguarding judicial integrity and restoring the parties to the status quo ante. And in this case, these factors squarely point in favor of suppression.

Viewing this case through the lens of these other justifications for exclusion also clarifies how and why suppression serves the rule's primary purpose of deterring Fourth Amendment violations. Placing a stamp of judicial approval on the use of the evidence collected here would send a message to law enforcement officers that the Fourth Amendment is irrelevant as long as a warrant check turns up an outstanding warrant. By contrast, suppressing the evidence and denying the government the ill-gotten gains of its violation will encourage officers to err on the constitutional side of the line.

The costs of suppression, meanwhile, are minor here in comparison to the benefits achieved. Law enforcement officers would not lose the ability to execute outstanding arrest warrants. Nor would they be unreasonably impeded in their ability to investigate criminal activity. To be sure, some evidence of criminal activity would be kept out of court—but this Court has long recognized that to be a price worth paying to vindicate the guarantee of the Fourth Amendment. It assuredly is here.

ARGUMENT

THE EVIDENCE WAS CORRECTLY EXCLUDED FOR REASONS THAT ARE DISTINCT FROM, BUT RELATED TO, DETERRENCE

A. The exclusionary rule serves purposes other than deterrence alone

Nobody denies that the primary purpose served by the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960). In fact, "deterrent value is a 'necessary condition for exclusion.'" *Davis* v. *United States*, 131 S. Ct. 2419, 2427 (2011) (quoting *Hudson* v. *Michigan*, 547 U.S. 586, 596 (2006)). But, this Court has ruled, it is only the beginning of the analysis (*ibid.*); the decision to admit or exclude evidence requires the court to balance the competing costs and benefits: "'[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.'" *Herring* v. *United States*, 555 U.S. 135, 141 (2009) (quoting *Illinois* v. *Krull*, 480 U.S. 340, 352-353 (1987)). Accord *United States* v. *Calandra*, 414 U.S. 338, 348 (1974) ("application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," entailing a "balancing process").

It is true that application of the exclusionary rule will make conviction more difficult in some circumstances. *Davis*, 131 S. Ct. at 2427. But *declining* to suppress evidence—allowing the entry of tainted evidence into court and permitting the government

to profit from its own wrongdoing—has systemic social costs of its own. The exclusionary rule is an "essential auxiliary" to the Fourth Amendment in part because it forestalls those costs, which must be taken into account along with deterrence in the balancing of costs and benefits. See *Herring*, 555 U.S. at 151 (Ginsburg, J., dissenting).

1. Judicial integrity is an important factor in the balance of benefits and burdens

In its first recognition of the exclusionary rule under the Fourth Amendment, the Court admonished that "[t]he efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the [Fourth Amendment]." *Weeks* v. *United States*, 232 U.S. 383, 393 (1914). Thus, "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures * * * should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution" and not its violation. *Id.* at 392.

That fundamental and original rationale for the exclusionary rule—preserving the "judicial integrity [that is] so necessary in the true administration of justice" (*Mapp* v. *Ohio*, 367 U.S. 643, 660 (1961))—has been reaffirmed in more recent cases. "[T]he federal courts [should not] be accomplices," the Court has declared, "in the willful disobedience of a Constitution they are sworn to uphold." *Elkins* v. *United States*, 364 U.S. 206, 223 (1960). And there can be no doubt that "[a] ruling admitting evidence in a criminal trial * * * has the necessary effect of legitimizing

the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry* v. *Ohio*, 392 U.S. 1, 13 (1968). It is the "process of inclusion and exclusion," in other words, that reflects judicial "approv[al]" of "conduct [that] comport[s] with constitutional guarantees" and "disapprov[al]" of conduct that does not. *Ibid.*

Preserving judicial integrity is, moreover, a matter of real practical importance. As the Court has noted in other contexts, "[t]he judiciary's authority * * * depends in large measure on the public's willingness to respect and follow its decisions." *Williams-Yulee* v. *The Florida Bar*, 135 S. Ct. 1656, 1666 (2015). That follows from "the place of the judiciary in the government." *Ibid.* "Unlike the executive or the legislature, the judiciary 'has no influence over either the sword or the purse'"; its authority flows from its reason and integrity alone. *Ibid.* (quoting The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton)). And it should go without saying that "public confidence in judicial integrity" requires that justice "'satisfy the appearance of justice.'" *Id.* at 1667 (quoting *Offutt* v. *United States*, 348 U.S. 11, 14 (1954)).

Permitting the government to profit from its own wrongdoing—allowing it to secure a conviction on the basis of evidence that all acknowledge was obtained illegally—does self-evident violence to judicial integrity and the appearance of justice. A violation of the Fourth Amendment is bad enough in its own right. But it adds judicial insult to executive injury to permit evidence uncovered as a direct consequence of the violation to turn up in a solemn criminal proceeding as proof of guilt. In every case in which

evidence is seized unlawfully and "used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment" appears to the defendant to have "no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." *Mapp*, 367 U.S. at 648 (quoting *Weeks*, 232 U.S. at 393). And to the broader public, the Fourth Amendment seems an "empty promise." *Id.* at 660. Thus, as this Court has acknowledged, judicial approval of "shortcut methods in law enforcement impairs [the] enduring effectiveness" of the criminal justice system. *Mapp*, 367 U.S. at 658.

To be sure, the Court's most recent exclusionary-rule decisions have focused increasingly on deterrence as the chief underpinning for the exclusionary rule. But the Court has never repudiated the many earlier cases recognizing judicial integrity as another core justification for the rule. *E.g.*, *United States* v. *Peltier*, 422 U.S. 531, 539 (1975) ("considerations of either judicial integrity or deterrence of Fourth Amendment violations" can support suppression); *Harrison* v. *United States*, 392 U.S. 219, 224 n.10 (1968) ("it is not deterrence alone that warrants the exclusion of evidence illegally obtained—it is 'the imperative of judicial integrity'") (quoting *Elkins*, 364 U.S. at 222). Thus today, as ever before, the suppression question must turn on "considerations of deterrence *and* of judicial integrity." *Brown* v. *Illinois*, 422 U.S. 590, 599 (1975) (emphasis added).

At the very least, then, judicial integrity has an important role to play in the courts' balancing of benefits and burdens. Concern for judicial integrity recognizes that there are social costs on both sides of the scale—the cost of having "to ignore reliable, trustworthy evidence bearing on guilt or innocence"

(*Davis*, 131 S. Ct. at 2427) on the one hand, versus the cost of infecting a judicial proceeding with constitutionally tainted evidence (*Mapp*, 367 U.S. at 648) on the other. Concern for judicial integrity weighs strongly in favor "'closing the doors of the federal courts to any use of evidence unconstitutionally obtained.'" *Brown*, 422 U.S. at 599 (quoting *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963)).

2. Restoration of the status quo ante is likewise an important consideration

A second concern similarly warrants close consideration separate and apart from deterrence: recognition that the exclusionary rule is meant to restore the status quo ante, "giv[ing] to the individual no more than that which the Constitution guarantees him," and giving "to the police officer no less than that to which honest law enforcement is entitled." *Mapp*, 367 U.S. at 660.

Restoration of the status quo ante is a fundamental aim of the Anglo-American legal tradition. Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 Wake Forest L. Rev. 261, 284 (1998). For example, while it is surely a critical purpose of tort law to deter others from acting without due care, tort law is aimed first and foremost at restoring the plaintiff to the position he would have been in if the tort had not occurred. *Id.* at 285.

The exclusionary rule has historically been intended to achieve the same objective: to "restore[] the situation that would have prevailed if the Government had itself obeyed the law." *Harrison*, 392 U.S. at 224 n.10. It is precisely that consider-

ation that explains the "inevitable discovery" exception to the rule: "Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place," but "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings." *Nix* v. *Williams*, 467 U.S. 431, 447 (1984). In the absence of inevitable discovery, however, fairness and equity demand putting the parties in the same position as if the unlawful conduct had never taken place.

It is a common objection to this reasoning that "exclusion puts the police in a *worse* position than they would have been in had they followed the rules because they can never go back and re-search." Craig M. Bradley, *Murray v. United States: The Bell Tolls for the Search Warrant Requirement*, 64 Ind. L.J. 907, 913 (1989). Thus, it is argued, "[t]he frequent impact of the exclusionary rule is that evidence which could have been legally obtained is excluded due to police error." *Ibid.*

That objection has no force here. In the mine run of cases, the evidence uncovered in the search would never have been detected by the police in the first place. The offense for which the warrant has issued is typically a minor offense like failure to appear in traffic court, and the evidence obtained in the search incident to arrest is ordinarily relevant to an offense unrelated to the offense of arrest. Comment, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 Yale L.J. 177, 183 &

n.29 (2008). Absent a search incident to the arrest on the unrelated warrant, the evidence would not have been lawfully obtained by other means. Thus, suppression returns the police to where they were before the encounter began; they are no worse off than if the illegal detention had never taken place.

B. The rule's alternative rationales help explain why suppression would deter violations like the one in this case

Although concern for judicial integrity and restoring the status quo ante are in many respects independent of the deterrence rationale, here they cast useful light on why deterrence requires suppression.

1. Consider the question from the perspective of a pair of officers patrolling a high-crime area on foot. Imagine the officers have a hunch that a pedestrian is carrying contraband, but they lack the articulable suspicion necessary to conduct a lawful *Terry* stop or the probable cause to search his person without consent. The officers decide to stop the pedestrian nonetheless. Going into the encounter, the officers would know three things under Utah's answer to the question presented: (1) if they run a warrants check and the individual has an open warrant, they will surely discover it; (2) if they discover an open arrest warrant, any evidence they seize in the search incident to arrest will be admissible, regardless of whether the initial stop violates the Fourth Amendment; and (3) if they do not discover a warrant, they can release the individual and are no worse off. *Discovering Arrest Warrants*, *supra*, at 183. The officers have nothing to lose, in other words, and much to

gain by conducting a stop even when it is supported by shaky facts.[2]

It would blink reality to say that a legal regime like that would not encourage systematic and recurring violations of the Fourth Amendment. Acknowledging as much is not to impugn otherwise well-meaning and hard-working law enforcement officers. It is instead to acknowledge that Utah's proposed approach is one that provides officers with strong incentive to err on the wrong side of the constitutional line in the name of a "general interest in crime control" (*Terry*, 392 U.S. at 48). This Court previously has advocated avoidance of "rulings resolving unsettled Fourth Amendment questions" that would leave "law enforcement officials [with] little incentive to err on the side of constitutional behavior." *United States* v. *Johnson*, 457 U.S. 537, 561 (1982). But that is just what Utah's proposed rule does here.

The Court's teachings on judicial integrity in this context further inform the analysis. If the judiciary were to lend such a scheme its approval, not only would it make the courts "accomplices" in general disobedience to the Fourth Amendment (*Elkins*, 364 U.S. at 223), but it would have "the necessary effect of legitimizing the conduct which produced the evidence" (*Terry*, 392 U.S. at 13). That matters not only because it casts the judiciary in a poor light, but also (and perhaps more importantly) because it sends

---

[2] Although an illegal and ultimately fruitless *Terry* stop does not impose a major cost on officers, it "constitute[s] a 'serious intrusion'" for the individual stopped, and "may inflict great indignity and arouse strong resentment." *Dunaway* v. *New York*, 442 U.S. 200, 209 (1979) (quoting *Terry*, 392 U.S. at 20). In other words, the true cost of the stop is a classic externality.

a clear message to law enforcement officers that the courts are willing to overlook a prior constitutional transgression if a warrant is uncovered. After all, when officers find an open arrest warrant under Utah's rule, the unconstitutionality of the initial detention simply falls away. The ends having justified the means, the initial illegality becomes little more than an inconvenient afterthought. That is not a message the Court should endorse.

For their parts, Utah and the United States assert that suppression is warranted only when the violation at issue is "flagrant" and "purposeful," and that deterrence is not served by suppressing evidence in cases involving mere "misjudgments" or "good faith" mistakes. Pet. Br. 28; U.S. Br. 32-33. That is a strange contention. No party here disputes that the fruits of an unlawful *Terry* stop generally must be suppressed, regardless whether the violation was flagrant. The only question is whether the discovery of an outstanding warrant attenuates the taint of the illegal stop, allowing for the admission of any evidence obtained. Whether the violation was glaring or a close call makes no difference under the Court's attenuation cases.

More broadly, the Court has expressly rejected the idea that flagrant Fourth Amendment violations are the only violations deterred by the exclusionary rule. It reaffirmed in *Herring* and *Davis*, for example, that the exclusionary rule is capable of "'meaningful deterrence'" when applied not only to deliberate misconduct, but also to "'recurring or systemic negligence.'" *Davis*, 131 S. Ct. at 2428 (quoting *Herring*, 555 U.S. at 144). It likely did so with cases such as this in mind.

The violation at issue here—an unlawful *Terry* stop involving a routine warrants check—is certain to recur on a systemic basis absent suppression in this case. The rule urged by Utah necessarily encourages officers to be less careful in their adherence to constitutional rules. It teaches that, as long as the officers find an open warrant—and there is a substantial chance that they will in every encounter (see Resp. Br. 1-5)—all will be forgiven. That approach gives powerful incentive to err in favor of violating the Fourth Amendment in borderline cases; it is a clear invitation not for "simple, 'isolated' negligence," *Davis*, 131 S. Ct. at 2438, but for "recurring or systemic negligence." *Id.* at 2428. That is cause for real concern, because "illegitimate and unconstitutional practices get their first footing" in their "mildest and least repulsive form[s]," and "by silent approaches and slight deviations" from previously accepted practice. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 228 (1973) (quoting *Boyd* v. *United States*, 116 U. S. 616, 635 (1886)).

And the social cost of that invitation will fall disproportionately on communities of color. Many recent studies have shown that the "stop and frisk" tactics employed by many police departments frequently have a disparate impact on members of minority communities—particularly young black and Latino men. See, *e.g.*, N.Y. Civil Liberties Union, Press Release, *Analysis Finds Racial Disparities, Ineffectiveness in NYPD Stop-and-Frisk Program*, May 22, 2013, perma.cc/KS3Z-39WV; Ctr. for Constitutional Rights, *Stop and Frisk: The Human Impact* (July 2012), at 11, perma.cc/9XR2-HHVR ("analysis of stop-and-frisk data clearly indicates that race is the primary factor in determining who gets stopped").

2. In response to all of this, Utah and the United States say that the *Terry* rule itself already provides a "substantial deterrent" to violations, because evidence obtained by an officer in an improper *Terry* stop will generally be inadmissible in cases where a warrant is *not* uncovered. U.S. Br. 29-30; see also Pet. Br. 22. And they assert that it is "not plausible" that officers would initiate unlawful stops in the hopes of discovering an outstanding warrant, given the low likelihood that any particular individual who encounters the police will have an outstanding warrant. U.S. Br. 30.

That again ignores reality. In fact, the likelihood that offers will discover an outstanding warrant is, in some communities, greater than not. See Resp. Br. 1-2 (citing statistics concerning Ferguson, Missouri). Even aside from outliers like Ferguson, outstanding warrants are strikingly common; in some major metropolitan areas, as many as one in three citizens have bench warrants in their names for unpaid parking tickets or trivial moving violations. See *Discovering Arrest Warrants*, *supra*, at 183 n.29; accord Resp. Br. 1-5.

At the same time, officers have little to gain by bringing someone to the station to pay a $20 parking ticket or $100 traffic ticket. The real utility of discovering an arrest warrant is to obtain authorization for a search incident to arrest when the officers otherwise lacks probable cause or consent. *Terry*, taken alone, does nothing to silence that siren song.[3]

---

[3] The United States suggests that officers are deterred from making unlawful *Terry* stops by the possibility of Section 1983 or *Bivens* liability. U.S. Br. 30. But as the government knows

The United States also points out that officers can discover whether a person has an outstanding warrant by other, "easier" means, such as following him to his home, car, or workplace, or asking neighbors or coworkers. U.S. Br. 30. That may be so, but the sort of encounter in which the question presented arises does not typically involve an active attempt to serve a known warrant or investigate a known crime—which are, as a practical matter, the only circumstances that might call for "putting a tail" on a suspect. Absent such circumstances, it is not realistic to think that an officer would follow an individual about whom he has a mere hunch simply to learn the individual's name some indefinite period of time later, so that he can conduct a warrants check.

Nor is it an answer to say that the officer can simply ask the individual for his name. An officer who initiates a consensual encounter almost always confirms the individual's identity by asking for identification. See, *e.g.*, *Golphin* v. *State*, 945 So. 2d 1174, 1190 (Fla. 2006) ("a routine police-citizen consensual encounter" ordinarily "include[s] the officer retaining [the individual's] identification for the purpose of running a warrants check"). Many courts have held that an officer detains an individual when he receives and retains the individual's identification. See, *e.g.*, *United States* v. *Lopez*, 443 F.3d 1280 (10th Cir. 2006); *State* v. *Markland*, 112 P.3d 507 (Utah 2005). If that is correct—and we submit

---

well, qualified immunity will bar civil damages in nearly all such cases. Cf. *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987) ("it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials * * * should not be held personally liable").

that it is—then the government's "easier" alternative is no alternative at all.

* * *

In the final analysis, concern for the exclusionary rule's other rationales in this case not only accords better with the rule's history and theoretical underpinnings, but it better ensures that unconstitutional conduct is deterred. Utah's contrary position would mean placing a judicial imprimatur on concededly unlawful conduct; that would both degrade the integrity of the courts and send a self-reinforcing message to law enforcement officers that the courts will look the other way from constitutional transgressions when a warrant is uncovered. In contrast, restoring the parties to the status quo ante sends the message that the State may not profit from the wrongdoing of its agents. Such an approach better preserves judicial integrity and gives law enforcement officers the "incentive to err on the side of constitutional behavior." *Johnson*, 457 U.S. at 561.

C. The social costs of suppression do not outweigh the considerations favoring it

The "'appreciable deterrence'" (*Davis*, 131 S. Ct. at 2426) of Fourth Amendment violations that suppression would yield in this context is more than sufficient to outweigh the costs that suppression would entail. Indeed, the costs of suppression are quite modest in circumstances like these.

As we have explained, suppression here does not deprive the police of evidence that they might have obtained by other, legal means; the evidence suppressed under respondent's rule is evidence that comes to light only by virtue of the unlawful *Terry* stop and the fortuitous discovery of an outstanding

arrest warrant during that stop. Forbidding its collection and use simply denies the police an unjustified windfall.

For similar reasons, suppression of evidence like that at issue here will not hinder criminal investigations. Respondent's suppression rule comes into play only when an officer's suspicion amounts to a unsubstantiated hunch, falling short of "a minimal level of objective justification for making the stop." *Illinois* v. *Wardlow*, 528 U.S. 119, 123 (2000). In situations like that, there is nothing to justify denying suppression that would not also justify denying suppression in the context of an authoritarian dragnet of the kind that even the government disavows. See U.S. Br. 6.

The United States suggests that exclusion in this context would interfere with important arrests, complaining that a rule requiring suppression of evidence in these circumstances "would not distinguish an individual with an outstanding warrant for a traffic violation from an individual with an outstanding warrant for armed robbery." U.S. Br. 34. That is a red herring. The question here is whether evidence uncovered in a search incident to the arrest is admissible in court as evidence of some *other* crime. Holding that the evidence must be suppressed with respect to a separate offense does not hinder the prosecution on the crime of arrest.

The United States also points out that suppressing evidence in these circumstances might deprive the police of "especially critical evidence * * * such as a firearm or drug ledger." U.S. Br. 34. That is unlikely—a study of New York's vast stop-and-frisk policy revealed that 99.9% of pedestrian stops did not turn up firearms. Wendy Ruderman, *For Women in Street Stops, Deeper Humiliation*, N.Y. Times, Aug.

6, 2012, perma.cc/4FLZ-53BM (click "View the live page"). But either way, the same risk exists when a police officer makes a *Terry* stop without reasonable suspicion and the person stopped does *not* have an outstanding warrant. In that circumstance, there is no denying that evidence found in a search attendant to the stop would have to be suppressed, no matter the nature of the evidence uncovered. There is no reason why a different result should obtain when the person happens to have an outstanding warrant for a crime unrelated to the stop; the costs and benefits are the same.

CONCLUSION

The judgment of the Supreme Court of Utah should be affirmed.

Respectfully submitted.

STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10025
(212) 549-2500

JEFFREY L. FISHER
Co-Chair, NACDL Amicus Committee
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

MICHAEL B. KIMBERLY
Counsel of Record
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
mkimberly@mayerbrown.com

Counsel for Amici Curiae

JANUARY 2016

Supreme Court, U.S.
FILED
DEC 11 2015
OFFICE OF THE CLERK

No. 14-1373

IN THE

Supreme Court of the United States

STATE OF UTAH,

Petitioner,

vs.

EDWARD JOSEPH STRIEFF, JR.,

Respondent.

On Writ of Certiorari to the Supreme Court of Utah

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorney for Amicus Curiae Criminal Justice Legal Foundation

QUESTION PRESENTED

Should evidence seized incident to a lawful arrest on an outstanding warrant be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful?

TABLE OF CONTENTS

Questions presented I

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 1

Summary of argument 3

Argument 5

I

Exclusion of evidence under the Fourth Amendment as incorporated in the Fourteenth has no basis in the original understanding 5

A. Understanding at the founding 5

B. Original exclusion fool's gold 14

C. Understanding in reconstruction 18

II

Turning a known criminal loose to prey again is an abomination, not a "more majestic conception" of our fundamental law 22

III

At a minimum, a clear violation of clearly established law should be an element of the defendant's case for suppression 26

Conclusion 31

TABLE OF AUTHORITIES

Cases

Anderson v. Creighton, 483 U. S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) 29, 30

Apprendi v. New Jersey, 530 U. S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) 24

Arizona v. Evans, 514 U. S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) 24, 25

Barron v. Mayor of Baltimore, 32 U. S. (7 Pet.) 243, 8 L. Ed. 672 (1833) 18

California v. Greenwood, 486 U. S. 35, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988) 28

Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841) 19, 20, 21

Crawford v. Washington, 541 U. S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) 25

Davis v. United States, 564 U. S. __, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011) 25

District of Columbia v. Heller, 554 U. S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) 13

Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C. P. 1765) 8, 9

Ex parte Bollman, 4 Cranch (8 U. S.) 75, 2 L. Ed. 554 (1807) 7, 16

Ex parte Burford, 3 Cranch (7 U. S.) 448, 2 L. Ed. 495 (1806) 16, 17

Ex parte Milburn, 9 Pet. (34 U. S.) 704,
9 L. Ed. 280 (1835) 17, 18

Ex parte Watkins, 3 Pet. (28 U. S.) 193,
7 L. Ed. 650 (1830) 7

Felker v. Turpin, 518 U. S. 651, 116 S. Ct. 2333,
135 L. Ed. 2d 827 (1996) 7

Frisbie v. Butler, 1 Kirby 213
(Conn. Sup. Ct. 1787) 15

Herring v. United States, 555 U. S. 135,
129 S. Ct. 695, 172 L. Ed. 2d 496 (2009) 24

Hudson v. Michigan, 547 U. S. 586, 126 S. Ct. 2159,
165 L. Ed. 2d 56 (2006) 29

Illinois v. Gates, 462 U. S. 213, 103 S. Ct. 2317,
76 L. Ed. 2d 527 (1983) 26

Jackson v. Virginia, 443 U. S. 307, 99 S. Ct. 2781,
61 L. Ed. 2d 560 (1979) 15

Johnson v. United States, 576 U. S. __, 135 S. Ct.
2551, 192 L. Ed. 2d 569 (2015) 26

Jordan v. Lewis, 104 Eng. Rep. 618
(K. B. 1740) 7, 8

Kennedy v. Louisiana, 554 U. S. 407, 128 S. Ct. 2641,
171 L. Ed. 2d 525 (2008) 27

King v. State, 425 Md. 550, 42 A. 3d 549 (2012) 23

Legatt v. Tollervey, 14 East 302, 104 Eng. Rep. 617
(K. B. 1811) 8

Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684,
6 L. Ed. 2d 1081 (1961) 5, 25, 28

McDonald v. City of Chicago, 561 U. S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) 19

Monell v. New York City Dept. of Social Servs., 436 U. S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) 29

People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926) 15

Ring v. Arizona, 536 U. S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) 24

Slaughter-House Cases, 16 Wall. (83 U. S.) 36, 21 L. Ed. 394 (1873) 18

Smith v. Maryland, 18 How. (59 U. S.) 71, 15 L. Ed. 269 (1855) 18

Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) 30

United States v. La Jeune Eugenie, 26 F. Cas. 832 (C. C.D. Mass. 1822) 11, 12, 13, 14

United States v. Verdugo-Urquidez, 494 U. S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) 12

Virginia v. Moore, 553 U. S. 164, 128 S. Ct. 1598, 170 L. Ed. 2d 559 (2008) 5

Wilkes v. Wood, Lofft 1, 98 Eng. Rep. 489 (C. P. 1763) 8

Wolf v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949) 25

United States Constitution

U. S. Const., Amdt. 14, § 5 30

United States Statutes

42 U. S. C. § 1983 29

42 U. S. C. § 1988 29

Secondary Authorities

Amar, A., The Law of the Land: A Grand Tour of Our Constitutional Republic (2015) 8

Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757 (1994) 5

Biographical Directory of the United States Congress, http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000942 11

Bishop, J., Criminal Procedure (1866) 19, 20

Chitty, J., Criminal Law (Peters ed. 1819) 10

Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547 (1999) 6, 8, 12, 13

Gray, A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence, 50 Am. Crim. L. Rev. 1 (2013) 6, 17

Greenleaf, S., Evidence (1st ed. 1842) 20

Greenleaf, S., Evidence (3d ed. 1846) 21

Greenleaf, S., Evidence (Redfield 12th ed. 1866) . . 22

Hurd, R., Habeas Corpus (2d ed. 1876) 17

Kamisar, In Defense of the Search and Seizure Exclusionary Rule, 26 Harv. J. L. & Pub. Pol'y 119 (2003) 6

LaFave, W., Search and Seizure (5th ed. 2012) 6, 24, 27

Roots, The Framers' Fourth Amendment Exclusionary Rule: The Mounting Evidence, 15 Nev. L. J. 42 (2014) 6, 15

Roots, The Originalist Case for the Fourth Amendment Exclusionary Rule, 45 Gonzaga L. Rev. 1 (2010) 6, 8, 9, 10, 12, 16, 17, 22

Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 88 Colum. L. Rev. 888 (1998) 7

U. S. Navy, Naval History and Heritage Command, USS Alligator (2014), http://www.history.navy.mil/research/underwater-archaeology/sites-and-projects/ship-wrecksites/uss-alligator.html (as visited Dec. 8, 2015) 14

IN THE

Supreme Court of the United States

STATE OF UTAH,

Petitioner,

vs.

EDWARD JOSEPH STRIEFF, JR.,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

---

1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In this case, the Utah Supreme Court has ordered the suppression of evidence in a criminal case even though there is no question of the validity or probative value of the evidence. Such a distortion of the truth-seeking function of criminal justice is contrary to the rights of victims of crime and law-abiding citizens that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts are stated in the Brief for Petitioner. We summarize them briefly here, based on the opinions in the state courts, to frame the issues in this brief. Based on an anonymous tip, South Salt Lake police conducted surveillance of a home to determine if drug selling activity was being conducted there. See Court of Appeals Opinion, App. to Pet. for Cert. 38. Officer Doug Fackrell observed a level of short-term activity that in his experience was consistent with drug activity. *Ibid.* He saw defendant Edward Strieff leave the house and believed he was a short-term visitor. He identified himself as a police officer and asked Strieff for identification. *Ibid.* A warrants check turned up an outstanding warrant for Strieff. A search incident to arrest found methamphetamine, a scale with powder residue, and a glass pipe. *Id.*, at 39.

The district court "found Officer Fackrell credible when he testified that he believed that the information known to him at the time was sufficient to support a reasonable, articulable suspicion to detain Strieff, a belief that later turned out to be mistaken." *Id.*, at 67. The District Court denied Strieff's suppression motion on an attenuation theory, App. to Pet. for Cert. 100, and a divided Court of Appeals affirmed on the same basis. *Id.*, at 83-84. The Utah Supreme Court reversed,

while noting that the law in this area has gaps and is confused. See *id.*, at 34-36.

The State of Utah petitioned for certiorari, stating the question as "Should evidence seized incident to a lawful arrest on an outstanding warrant be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful?" While this question includes the attenuation analysis engaged in by the Utah courts, it also fairly includes the question of whether suppression of evidence should be the consequence of an investigatory stop that is later found to be unlawful but was not clearly so at the time.

SUMMARY OF ARGUMENT

This Court has looked to the original understanding of the Fourth Amendment to determine its substantive scope, and it should also consider the original understanding in determining the remedies to be apply when it is violated.

Most authorities agree that there was no rule of exclusion of evidence in criminal cases on the ground that it was obtained via an illegal search or search or seizure at the time the Fourth Amendment was adopted or in the years closely following. There is no evidence in the text or history of the Amendment that such a remedy was ever contemplated. Justice Story, in an opinion written within the lifetime of many of the Framers, tells us that otherwise competent evidence had never been excluded on the basis of having been illegally obtained.

There is one academic who claims an originalist basis for the exclusionary rule, but his articles are deeply flawed. The cases he cites fail to provide any such basis for the rule.

Because the Fourth Amendment applies to the States only through the Fourteenth, understanding at the time of the adoption of the latter is also important. The leading treatise on evidence of the day states that there was no such rule, and proponents of exclusion have not found a single reported case to contradict it.

In *Maryland* v. *King*, the Maryland Court of Appeals would have turned a rapist loose to terrorize women again if this Court had not chosen the case to be one of the very few it reviews on the merits. Such a horror is not a "more majestic conception" of this nation's fundamental law. Freeing known criminals despite clear, valid proof of guilt is a dirty business to be engaged in, if at all, only in the circumstances that most clearly demand it.

It is time to stop speaking of good-faith exceptions to a general rule of exclusion and instead require a clear violation of law that was clearly established at the time of the search as an element of the exclusionary rule. If existing limitations of civil remedies would thereby leave a gap that is deemed constitutionally intolerable, the answer is to reconsider those limitations. Civil remedies are the remedies contemplated at the founding and authorized by Congress under its power to enforce the Fourteenth Amendment, and that is the proper place to provide any remedy deemed essential.

The question of "reasonable suspicion" in this case was a close one, and the officer reasonably believed he had met the requirement. There is no violation of the Fourth Amendment in this case that rises to the level that warrants the extreme remedy of suppressing evidence.

ARGUMENT

I. Exclusion of evidence under the Fourth Amendment as incorporated in the Fourteenth has no basis in the original understanding.

A. Understanding at the Founding.

> "The Fourth Amendment protects 'against unreasonable searches and seizures' of (among other things) the person. In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia* v. *Moore*, 553 U. S. 164, 168 (2008).

If this Court looks to the original understanding to determine the substance of the Fourth Amendment, should it not also look to the original understanding to determine remedies? There is nearly unanimous agreement that the rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), has no basis in the original understanding.

> "Tort law remedies were thus clearly the ones presupposed by the Framers of the Fourth Amendment and counterpart state constitutional provisions. Supporters of the exclusionary rule cannot point to a single major statement from the Founding — or even the antebellum or Reconstruction eras — supporting Fourth Amendment exclusion of evidence in a criminal trial. Indeed, the idea of exclusion was so implausible that it seems almost never to have been urged by criminal defendants, despite the large incentive that they had to do so, in the vast number of criminal cases litigated in the century after Independence." Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 786

(1994); see also Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 624 (1999) ("there was no exclusionary rule in the late eighteenth century").

The exclusionary rule's most prominent defenders therefore resort to other arguments for it, not even attempting to defend it on the basis of original understanding. See, *e.g.*, Kamisar, In Defense of the Search and Seizure Exclusionary Rule, 26 Harv. J. L. & Pub. Pol'y 119 (2003); 1 W. LaFave, Search and Seizure § 1.1, p. 8 (5th ed. 2012).

This view of the original understanding is nearly unanimous, but not quite. One exclusion advocate, Professor Roger Roots of Jarvis Christian College in Hawkins, Texas, has claimed to make an originalist case for the exclusionary rule. See Roots, The Originalist Case for the Fourth Amendment Exclusionary Rule, 45 Gonzaga L. Rev. 1 (2010) (cited below as "Roots"); Roots, The Framers' Fourth Amendment Exclusionary Rule: The Mounting Evidence, 15 Nev. L. J. 42 (2014) (cited below as "Roots, Mounting"). Roots's thesis has been widely dismissed, even by other advocates of exclusion. See, *e.g.*, Gray, A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence, 50 Am. Crim. L. Rev. 1, 14, n. 82 (2013). Even so, for the sake of completeness *amicus* will review here why a jurisprudence of original understanding has no room for a rule of exclusion of physical evidence from a criminal trial on the ground that it was obtained in violation of the Fourth Amendment.

Given the paucity of statements about exclusion of evidence in early cases and treatises, the first question is what conclusion we should draw from an absence of decisions. A scarcity of cases finding, applying, or even mentioning a rule or practice, combined with a

dismissive rejection when a party finally does attempt it, is strong evidence that no such rule or practice existed. A similar situation arises in the historical debates over the use of habeas corpus as a postconviction collateral attack. In federal criminal cases, this Court originally had no jurisdiction to hear appeals from convictions, but it did have habeas corpus jurisdiction, creating a powerful incentive to use habeas corpus as a postconviction remedy if such usage had been available. Yet the habeas jurisdiction was exercised entirely pretrial, see, *e.g.*, *Ex parte Bollman*, 4 Cranch (8 U. S.) 75 (1807), it was not until 1830 that any convicted defendant attempted to use the writ postconviction, see *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 199 (1830) (attorney general had not found a single case), and that attempt was unequivocally rejected. See *id.*, at 207; see also Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 928-932 (1998). In this state of affairs, there is no originalist argument that the Suspension Clause requires postconviction review of judgments of courts of competent jurisdiction, and anyone claiming such a constitutional requirement must resort to nonoriginalist arguments. See *Felker* v. *Turpin*, 518 U. S. 651, 663-664 (1996).

So it is with the exclusionary rule. As Amar notes, *supra*, there is a complete absence of authority of a rule of exclusion from evidence in criminal trials on the basis of illegal search or seizure from the dawn of the common law through Reconstruction. From pre-Revolution England we have only one civil case on exclusion, *Jordan* v. *Lewis*, 104 Eng. Rep. 618 (K. B. 1740). *Jordan* was a malicious prosecution case in which the copy of the prior indictment had been obtained illegally, contrary to an order of the court. It was held that the illegal copy was nonetheless admissible. "[T]he Court could not refuse receiving it in

evidence; nor could the Court take notice in what manner it was obtained." *Id.*, at 618. *Jordan* was followed in *Legatt* v. *Tollervey*, 14 East 302, 104 Eng. Rep. 617 (K. B. 1811). These cases are not squarely on point, to be sure, but they do indicate that a breach of the law in obtaining evidence was not a ground for excluding it as a general rule.

The famous pre-Revolution English cases of *Wilkes* v. *Wood*, Lofft 1, 98 Eng. Rep. 489 (C. P. 1763) and *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C. P. 1765)[2] are civil tort cases fully consistent with the thesis that civil remedies and not exclusion from evidence in criminal trials was originally understood to be the remedy for unreasonable searches and seizures. See A. Amar, The Law of the Land: A Grand Tour of Our Constitutional Republic 239-240 (2015). Roots puts great stock in dicta from Lord Camden in the Howell version of *Entick*:

> "It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty." *Entick*, 19 How. St. Tr., at 1073.

---

2. The two versions of *Entick* are not the same, and there is some dispute as to which was known in America at the time of the founding. See Davies, 98 Mich. L. Rev., at 565-566, n. 25; Roots, 45 Gonzaga L. Rev., at 41, n. 260. It does not matter for the purpose of this point, as neither version remotely supports a constitutional rule of exclusion of physical evidence with no testimonial characteristics.

In context, this passage is part of a discourse on the special status of papers. Lord Camden denied that warrants could issue for papers. He expressly distinguished searches for stolen goods, a practice that was established by this time. See 19 How. St. Tr., at 1067. To the extent that this passage carries any implication for exclusion of evidence from a criminal trial, it is clearly based on a self-incrimination theory and limited by its rationale to evidence of a type that implicates that distinct right, *i.e.*, evidence with testimonial content.

Roots also cites a passage from *Wilkes*. "'Nothing can be more unjust in itself,' the *Wilkes* opinion proclaimed, 'than that the proof of a man's guilt shall be extracted from his own bosom,' in specific reference to the seizure of Wilkes' *papers*." Roots, *supra*, at 40 (quoting 98 Eng. Rep., at 490, emphasis in original). Again, this is about papers and implies a self-incrimination theory, and there is no basis for extrapolating it to evidence generally. The evidence in the present case is contraband, more like stolen goods, as the possessor has no right to possess it, and nothing at all like papers.

Whatever the rule may have been for papers, there were search warrants for stolen goods in the founding era, and there were established requirements for their validity. If there were a rule of suppression, either of the goods themselves or the "fruit" of the search in the form of testimony of the searchers, we would expect to find it stated in the search warrant sections of the treatises of that era.

The treatises available in the period shortly after the founding were largely English treatises, sometimes published with American notes. One of these is Joseph Chitty's treatise on criminal law, published in Philadelphia in 1819 with notes by Richard Peters, later a reporter of this Court. This treatise has a section on

search warrants, J. Chitty, Criminal Law 52-58 (Peters ed. 1819), and it is remarkable for what it says but even more for what it does not say.

Chitty confirms that, notwithstanding remarks by Coke, the legality of search warrants for stolen goods was clearly established. See *id.*, at 52. Warrants for papers were distinguishable and not allowed. See Chitty, at 52-53. "If on return of the warrant . . . it appear [that the goods] were stolen, they are not to be delivered to the proprietor, but deposited in the hand of the sheriff or constable, in order that the party robbed may proceed by indicting and convicting the offender, to have restitution." *Id.*, at 54. Roots's assertion that search warrants for stolen goods were solely for the purpose of immediately restoring them to the rightful owner, Roots, *supra*, at 16, is thus mistaken.

Chitty addresses remedies as well, a discussion consisting entirely of the circumstances under which the executing officer or the issuing magistrate may be held liable in a civil action for damages. *Id.*, at 55-58. In a treatise devoted to criminal law, the section on search warrants discusses remedies for invalid warrants or illegal execution entirely in terms of civil liability, with not a single word about the trial of the criminal case. This is truly a circumstance where silence speaks volumes.

Roots claims that the absence of any discussion of search and seizure issues in criminal cases can be explained by the lack of appellate jurisdiction in criminal cases in early America and the minimal reporting of cases in pre-Revolutionary America. See Roots, *supra*, at 15-16. This explanation does not fly. Case reports in England before the Revolution and in America in the years after the founding included trials, not just appeals. If there had been a practice of excluding evidence from criminal trials for any of the numerous defects

that Chitty notes in the civil remedy cases, that practice would appear in those reports and in the criminal law treatises based on them. The real reason for a lack of search and seizure issues in both pre-Revolution English cases and post-Revolution American cases is that the legality of search and seizure was generally irrelevant to the criminal case *because there was no rule of exclusion*.

The absence of any exclusionary rule at the time of the founding is further confirmed by the reaction of courts when such a rule was finally suggested. The clearest indication within the lifetime of many of the Framers comes from Justice Story in a famous slave ship seizure case, *United States* v. *La Jeune Eugenie*, 26 F. Cas. 832, No. 15,551 (C. C.D. Mass. 1822). The vessel was captured by the renowned Lt. Robert Stockton.[3] Evidence showed that the vessel was engaged in the slave trade and raised doubt as to whether a purported transfer from American to French ownership was a subterfuge to avoid the American confiscation penalty for slave trading. *Id.*, at 840-841. But was that evidence admissible? Justice Story responded to an argument it was not, and the response is worth quoting in full.

> "As to the other position, that if there exists no right of visitation and search, there cannot exist any right to use any evidence, which may be discovered by such search, I must be permitted to doubt, if that doctrine, in the full

---

3. Stockton was later promoted to commodore, became the military governor of California during the Mexican War, and was elected to the Senate from New Jersey. See Biographical Directory of the United States Congress, http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000942. The cities of Stockton, California and Fort Stockton, Texas are named in his honor.

> extent of its meaning, can be supported. In the ordinary administration of municipal law *the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it is obtained*. If it is competent or pertinent evidence, and *not in its own nature objectionable*, as having been created by constraint, or oppression, such as confessions extorted by threats or fraud, the evidence is admissible on charges for the highest crimes, even though it may have been obtained by a trespass upon the person, or by any other forcible and illegal means. The law deliberates not on the mode, by which it has come to the possession of the party, but on its value in establishing itself as satisfactory proof. In many instances, and especially on trials for crimes, evidence is often obtained from the possession of the offender by force or by contrivances, which one could not easily reconcile to a delicate sense of propriety, or support upon the foundations of municipal law. Yet I am not aware, that such evidence has upon that account *ever* been dismissed for incompetency." *Id.*, at 843-844 (emphasis added).

Supporters of exclusion attempt to dismiss this sweeping language. Roots, *supra*, at 55-56, n. 345, relies on the discussion in Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 664-665, n. 320 (1999). It is true enough that Justice Story was not addressing a constitutional Fourth Amendment claim, see *ibid.*, as that amendment has no application to a search outside the limits of the United States of a ship claimed to be foreign owned. See *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 267 (1990). However, Justice Story spoke in sweeping terms of competent

evidence that had been obtained by "illegal means," and there is no reason to believe that the law at this point in history distinguished remedies for Fourth Amendment violations from remedies for violations of other sources of search-and-seizure law. Given that the Fourth Amendment "codified a *pre-existing* right" rather than creating a new one, *District of Columbia* v. *Heller*, 554 U. S. 570, 592 (2008) (emphasis in original), one would not expect that it was thought to provide a unique remedy for constitutional violations as opposed to violations of the pre-existing statutory and common-law rules it was intended to protect from encroachment.

Davies further contends that the claimants made only an argument tying the right to seize to a right to search and that Justice Story's statement about exclusion from evidence is dictum. See 98 Mich. L. Rev., at 665, n. 320. That is simply not the case. Justice Story noted that two related objections have been made, one for jurisdiction over the case and one for use of evidence, *La Jeune Eugenie*, 26 F. Cas., at 842, and his statement about exclusion is clearly addressed to "the other position," *id.*, at 843, *i.e.*, the evidence argument. This is holding, not dictum, and it is directly addressed to an exclusionary argument by the claimants.

In his final attempt to sink the schooner, Davies contends, "Story did not refer to a *government* arrest . . . All Story's dictum stands for is the unexceptional proposition that exclusion is not appropriate when evidence has been obtained through an unlawful *private* arrest and search — a view which has never been seriously challenged." 98 Mich. L. Rev., at 665, n. 320 (emphasis in original). On the well-known facts of this famous case, this is an absurd statement. Of course this is government action. Lt. Stockton was an officer of the United States Navy commanding a Navy ship, and the search and seizure was in furtherance of the

mission to suppress the slave trade that the ship had been specifically built for and dispatched to perform. See U. S. Navy, Naval History and Heritage Command, USS Alligator (2014), http://www.history.navy.mil/research/underwater-archaeology/sites-and-projects/ship-wrecksites/uss-alligator.html; 25 F Cas, at 833. There is no need to refer specifically to government action when the whole case is about government action. Justice Story's comparison to the "ordinary administration of municipal law" certainly includes searches by constables. If the law for searches by government officers differed from the law for searches by private parties, there would be no point in referring to the latter in the disposition of this case.

The attempt to dismiss *La Jeune Eugenie* fails. Justice Story's statement tells us just what it says on its face. Just 31 years after the ratification of the Fourth Amendment, a rule of evidence excluding "competent and pertinent evidence . . . not in its own nature objectionable" on the ground of it "hav[ing] been obtained . . . by . . . illegal means" was unknown to American law. There is no basis for believing that the law recognized distinctions between Fourth Amendment violations and other violations or between searches by government officers and those by private parties. The Fourth Amendment, as understood in the founding era, included no exclusionary rule.

B. Original Exclusion Fool's Gold.

To support his originalist case for a Fourth Amendment exclusionary rule, Roots sifts through the silt of old cases, panning for the gold nugget of a case that actually supports exclusion. Though he claims to find nuggets, on examination they all turn out to be fool's gold.

We should be clear what kind of precedent would actually support an originalist argument for the exclusionary rule. The central vice of the rule, in Judge Cardozo's famous denunciation of it, is that "[t]he criminal is to go free because the constable has blundered." *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926). A gold nugget would be a case from the founding era or earlier in which a person known to be guilty of a crime based on evidence "not in its own nature objectionable" escaped punishment because of a defect in the process by which that evidence was obtained.

Roots's Exhibit A is *Frisbie* v. *Butler*, 1 Kirby 213 (Conn. Sup. Ct. 1787). "In the plainest language imaginable," he says, "the Connecticut Superior Court concluded in 1787 that the use of an unlawful warrant 'vitiates' subsequent criminal proceedings. The only question was 'how far.' " Roots, Mounting, 15 Nev. L. J., at 46. The *Frisbie* court actually said there was no need to decide the effect of the invalidity of the warrant.

The opinion is only two paragraphs, and the first paragraph is the dispositive one. The conviction is reversed because the facts alleged and proved did not amount to theft, the crime Frisbie was convicted of, but only a trespass. *Frisbie*, 1 Kirby, at 215. In modern terms, this is a *Jackson* v. *Virginia*, 443 U. S. 307 (1979) reversal. "With regard to the warrant," it was "clearly illegal" because it was "general" rather than limited to particular places, "yet, how far this vitiates the proceedings upon the arraignment, may be a question, which is not necessary now to determine . . . ." 1 Kirby, at 215. No evidence is suppressed. No one known to be a criminal goes free. Frisbie goes free because all the evidence presented, regardless of how it was obtained, did not establish the elements of the

offense. Even the dictum about the warrant does not even hint that a person actually known to be guilty should be freed due to an invalid warrant. There is nothing here to give any support whatever to an originalist case for the exclusionary rule.

Roots also puts great stock in early habeas corpus cases. He seems puzzled that other Fourth Amendment scholars do not regard *Ex parte Burford*, 3 Cranch (7 U. S.) 448 (1806) and *Ex parte Bollman*, 4 Cranch (8 U. S.) 75 (1807) as significant Fourth Amendment cases. See Roots, 45 Gonzaga L. Rev., at 26, n. 166. That is because they are not.

Burford, like many early reports, is the reporter's summary of oral proceedings. Burford was committed by justices of the peace of Alexandria, then part of the District of Columbia, for failure to post security, 3 Cranch, at 449-450, after having been declared "an evil doer and disturber of the peace . . . ." *Id.*, at 450-451. This Court ordered Burford released because "the warrant of commitment was illegal, for want of stating some good cause certain, supported by oath." *Id.*, at 453. Roots calls this an exclusionary remedy and claims that it demonstrates "that jurists of the Founding Era . . . regarded Fourth Amendment violations . . . as meriting total exclusion from custody, regardless of the 'guilt' of suspects." Roots, *supra*, at 24-25. It is nothing of the sort. This is a straightforward, routine, pretrial habeas corpus case. Burford was released because no legal cause had been shown to detain him.[4]

The nonexclusionary nature of the remedy is made clear at the end of the case. "If the prisoner is

---

4. *Bollman* is like *Frisbie*. Once the elements of the charged offense are understood, the evidence did not support a charge of treason. See *Ex parte Bollman*, 4 Cranch, at 134-135. This is a substantive criminal law case.

really a person of ill fame, and ought to find sureties for his good behaviour, the justices [of the peace] may proceed *de novo*, and take care that their proceedings are regular." *Burford*, 3 Cranch, at 453. Roots quotes that sentence but gets its import completely backwards. See Roots, *supra*, at 25, n. 154. Release on habeas corpus due to a defective commitment was not an exclusionary remedy because it did not preclude a new arrest and prosecution for the same offense. Roots's habeas argument fails because a release on habeas corpus on these grounds was without prejudice. See Gray, A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence, 50 Am. Crim. L. Rev. 1, 14, n. 82 (2013).

Evidently at oral argument in *Burford* this Court was quickly satisfied that the original commitment by the justices of the peace had been illegal and directed counsel to address whether the circuit court had redetermined cause for commitment on habeas corpus. See 3 Cranch, at 453. The Court discharged Burford only after finding that no *de novo* determination had been made by the circuit court. This reflects the settled rule that if the totality of the evidence showed good cause to commit the prisoner the habeas court need not discharge him "however defective the warrant may be, but [it is the duty of the court] to remand him or commit him *de novo*." R. Hurd, Habeas Corpus 415 (2d ed. 1876). The established legality of such a procedure negates Roots's claim that "habeas corpus operated as an antebellum exclusionary rule . . . " Roots, *supra*, at 21.

Reprosecution after discharge, noted as an alternative at the end of *Burford*, was upheld in *Ex parte Milburn*, 9 Pet. (34 U. S.) 704 (1835). Milburn had been discharged on habeas corpus due to a defective

process and claimed this as a bar to a subsequent arrest on new process. Justice Story, writing for the Court, made short work of the argument.

> "[This] ground is . . . unmaintainable. A discharge of a party under a writ of habeas corpus from the process under which he is imprisoned, discharges him from any further confinement under the process; but not under any other process which may be issued against him under the same indictment." *Id.*, at 710.

The foundation of Roots's argument from the habeas corpus cases, that habeas is an exclusionary remedy, is "unmaintainable."

The search for founding era authority for a Fourth Amendment exclusionary rule comes up with nothing of value. Even though there are many cases about the legality of searches and seizures brought by aggrieved searchees seeking civil remedies, none have been found excluding otherwise admissible evidence from a criminal trial on the basis of how it was obtained or in any way mandating that a known criminal go free because a constable (or justice of the peace) blundered on a search or seizure. The cases claimed to grant exclusionary remedies do nothing of the sort.

C. Understanding in Reconstruction.

On one aspect of the Fourth Amendment, there is no doubt whatever of the original understanding – it was solely a limitation on the federal government and did not apply to the states. *Barron* v. *Mayor of Baltimore*, 7 Pet. (32 U. S.) 243, 250 (1833) (Bill of Rights generally); *Smith* v. *Maryland*, 59 U. S. 71, 76 (1855) (Fourth Amendment specifically). After passage of the Fourteenth Amendment, this Court held in the *Slaughter-House Cases*, 16 Wall. (83 U. S.) 36 (1873),

that the Privileges or Immunities Clause does not incorporate the Bill of Rights. See *McDonald* v. *City of Chicago*, 561 U. S. 742, 754-756 (2010). In the twentieth century and into the twenty-first, this Court has addressed "incorporation" questions under the Due Process Clause of the Fourteenth Amendment, see *id.*, at 758, although the Privileges or Immunities Clause still has its supporters. See *id.*, at 805-858 (Thomas, J., concurring in part and concurring in the judgment).

In a state case, then, original understanding should include not only the understanding at the founding but also the understanding during Reconstruction. Was the exclusion of evidence from a criminal trial on the ground that it was obtained in violation of the Fourth Amendment or a state's kindred constitutional provision generally understood to be an element of due process of law (or, alternatively, a privilege or immunity of citizens of the United States) in 1868? No.

If a Reconstruction legislator wanted to know the answer to the exclusionary rule question, where would he look? If he considered it a criminal procedure question, he would likely have looked to Joel Prentice Bishop. If he considered it an evidence question, he would likely have looked to Simon Greenleaf. We should look there as well.

At the beginning of Reconstruction, Bishop's discussion of evidence consists of a discussion of burden of proof, presumptions, some aspects of the law of witnesses, and considerations that relate to particular offenses. On other matters, and that would include physical evidence, he says the law of evidence is largely the same as in civil cases and is appropriately addressed in treatises on that subject. See J. Bishop, Criminal Procedure §§ 483, 529, pp. 336, 377 (1866). In the section on search warrants, he cites *Commonwealth* v. *Dana*, 43 Mass. (2 Met.) 329 (1841), discussed *infra*, for

its substantive holding but makes no mention of the exclusionary rule or any claim for such a rule. Bishop §§ 716-719, at 503-504. So let us turn to Greenleaf.

The first edition of Greenleaf's treatise on evidence contains a chapter on evidence excluded for reasons of public policy with no mention of exclusion on the ground of having been obtained in an illegal or unconstitutional search or seizure. See S. Greenleaf, Evidence §§ 236-254, pp. 272-290 (1st ed. 1842). This silence is fully consistent with the inference from *La Jeune Eugenie*, see *supra*, at 11, that such a ground of exclusion was unheard of and no one was even arguing for it.

In 1841, the operator of an illegal lottery in Massachusetts finally made the constitution-based evidence argument in a criminal case, *Commonwealth* v. *Dana*, *supra*, and the Massachusetts Supreme Court squarely rejected it. The defendant claimed the warrant, the statute authorizing it, and the manner of execution violated a section of the Massachusetts Bill of Rights that is nearly identical to the Fourth Amendment. See 43 Mass., at 334. The court rejected the argument on substantive grounds, see *id.*, at 334-337, but the court also based its holding on an alternate ground.

> "There is another conclusive answer to all these objections. Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the

> issue, as they unquestionably were. When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question. This point was decided in the cases of *Legatt* v. *Tollervey*, 14 East, 302, and *Jordan* v. *Lewis*, 14 East, 306, note; and we are entirely satisfied that the principle on which these cases were decided is sound and well established. On either of these grounds, therefore, we are of the opinion that the evidence on the part of the Commonwealth was rightfully admitted." *Id.*, at 337-338.

This is an alternate holding, not obiter dicta. The question was squarely raised, and one of the most prestigious courts in the country at the time squarely held that the legality of the warrant was irrelevant to the admissibility of the evidence.[5]

In the third edition, Greenleaf added a new section to the public policy exclusion chapter stating the rule of *Dana*. See S. Greenleaf, Evidence § 254a, pp. 368-369 (3d ed. 1846). If other states had a contrary rule and decided the issue the other way, we would expect to see that noted in later editions, but we do not. This section remained substantially unchanged in nine subsequent editions, and our hypothetical Reconstruction legislator would have found this in the leading authority on evidence at the time:

> "§ 254*a*. It may be mentioned in this place, that though papers and other subjects of

---

5. "Admitting" in this passage clearly means "assuming for the sake of argument." Of course Justice Wilde did not "admit" that the evidence was illegally obtained in the sense of a concession, as he had just discussed at some length why it was not.

> evidence may have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The Court will not take notice of how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question.[2]
>
> [2] Commonwealth *v.* Dana, 2 Met. 329, 337; Leggett *v.* Tollervey, 14 East, 302; Jordan *v.* Lewis, Id. 306, note." S. Greenleaf, Evidence § 254a, p. 287 (Redfield 12th ed. 1866).

Roots notes that only two jurisdictions had precedents squarely rejecting exclusionary arguments, see Roots, at 54-55, but he fails to cite a single case *accepting* such an argument. The obvious implication seems to escape him. The other states had no precedents either way because it was so obvious to lawyers at the time that there was no rule of exclusion that none of them made that objection.

The federal question in this case is whether the Utah District Court violated the Fourteenth Amendment by admitting the evidence at issue. As that Amendment was understood at the time of its adoption, the answer is no beyond question.

II. Turning a known criminal loose to prey again is an abomination, not a "more majestic conception" of our fundamental law.

On September 21, 2003, a nightmare came true for Vonette W., a 53-year-old resident of Salisbury, Maryland. An unidentified man broke into her home. "The man, wearing a scarf over his face, a hat pulled over his head, and armed with a hand gun, entered

Vonette W.'s bedroom, and ordered her not to look at him. While holding the gun to her head, he raped Vonette W. After the rape, he left with Vonette W.'s purse." *King* v. *State*, 425 Md. 550, 557-558, 42 A. 3d 549, 553-554 (2012), rev'd *Maryland* v. *King*, 569 U. S. __, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

More nightmares were to follow. First, the case remained unsolved for six years until Alonzo King was arrested for another violent crime and DNA tested, at which point a hit in Maryland's DNA database identified him as the perpetrator. King's motion to suppress was denied, and he was convicted and sentenced to life in prison. See *id.*, at 560, 42 A. 3d, at 555. Then came one more nightmare. The highest court of Maryland decided that the DNA collection violated the Fourth Amendment and that "the evidence presented at trial should have been suppressed . . . ." *Id.*, at 561, 42 A. 3d, at 556.

Although nominally a remand for a new trial, see *ibid.*, the Maryland high court's decision in reality was an order for King to go free of the rape charge, given that the critical evidence was suppressed. After whatever time he served for the subsequent assault, he would be free to prey upon new victims and seek revenge against prior ones. What must Vonette W. have thought upon hearing that news?[6]

Fortunately, this case was one of the handful out of thousands that this Court accepts for review on the merits. Fortunately, again, the state prevailed on the merits, but only by the narrowest of margins. It could easily have gone the other way. There is no exception

---

6. Of course, *amicus* has not intruded upon Ms. W.'s privacy by seeking her out and asking for her reaction, but it is not difficult to make a reasonable estimate of what she must have felt or what most people in that situation would feel.

to the exclusionary rule for crimes against individuals, as distinguished from so-called "victimless" crimes, or even for crimes of violence. See 1 LaFave § 1.2(e), at 61-65 (criticizing proposal for such an exception). A person candidly advising Ms. W. on the day the Maryland Court of Appeals' decision was rendered would have had to tell her there was a 99% probability that Alonzo King would be back on the street before long.

Could any person with a basic sense of decency have looked Vonette W. in the eye on that day and told her that this result reflects "a more majestic conception" of our fundamental law? That phrase has been used by those who maintain that the exclusionary rule is something more than a pragmatic tool for deterrence, something to be employed even where no deterrent function is served. See *Arizona* v. *Evans*, 514 U. S. 1, 18 (1995) (Stevens, J., dissenting); *Herring* v. *United States*, 555 U. S. 135, 151 (2009) (Ginsburg, J., dissenting). There is nothing remotely majestic about turning a known rapist loose to rape again. It is a vile, dirty deed. Reasonable people might argue that it is the lesser of two evils, but it is beyond the bounds of reason to contend it is not evil at all but rather "majestic."

Supporters of exclusion may argue that suppression in cases of violence is uncommon and that most suppressions occur in so-called "victimless" crimes like the present one. Numbers are irrelevant. If one rapist or one murderer goes back on the street because valid, probative evidence has been suppressed, that is one too many.

More than once in recent history, this Court has thrown decades of precedent on the scrap heap because it was found to be contrary to the Constitution as originally understood. See *Apprendi* v. *New Jersey*, 530 U. S. 466, 478-484 (2000) (originalist basis of *Apprendi* rule); *Ring* v. *Arizona*, 536 U. S. 584 (2002) (overruling

massively relied-on precedent squarely on point as inconsistent with *Apprendi*); *Crawford* v. *Washington*, 541 U. S. 36, 60 (2004) (overruling test that had governed Confrontation Clause questions for a quarter century "to reflect more accurately the original understanding").

The rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), is so clearly unsupportable under the original understanding of the Fourth and Fourteenth Amendments that *stare decisis* cannot save it. It involves the courts in the dirty business of putting certainly guilty criminals back on the street, a business far dirtier than that of accepting evidence obtained in searches conducted with a shade less evidence than what is required. "Extreme sanction" is indeed an entirely accurate characterization, cf. *Arizona* v. *Evans*, 514 U. S., at 19 (Stevens, J., dissenting), and such a sanction requires exceptionally compelling justification.

The simplest answer would be to acknowledge that this Court got it right the first time in *Wolf* v. *Colorado*, 338 U. S. 25, 33 (1949), and overrule *Mapp*. If this extreme sanction is not (or not yet) to be scrapped altogether, the long line of cases limiting that sanction to the circumstances in which it is most needed and effective should continue. See *Davis* v. *United States*, 564 U. S. __, 131 S. Ct. 2419, 2426-2427, 180 L. Ed. 2d 285, 293-294 (2011). At a minimum, the Court should make explicit what *Davis* and *Herring* imply. Because the extreme sanction is justified (if ever) only in cases of police culpability, such culpability should be an element of the defendant's case for exclusion rather than continuing to catalog various types of nonculpability as "good-faith exceptions" to a general rule of exclusion.

III. At a minimum, a clear violation of clearly established law should be an element of the defendant's case for suppression.

In a Fourth Amendment case, such as the present case, where a search or seizure is challenged on the basis of the quantum of evidence possessed by the officer, the standard is inherently vague, and it is judged by all the facts and circumstances, not rigid rules. See *Illinois* v. *Gates*, 462 U. S. 213, 238 (1983). Judging whether a given collection of evidence amounts to "reasonable suspicion" or "probable cause" is very often a "judgment call" on which reasonable people can differ. In the present case, the officer believed he had enough, but the prosecutor decided he was a tad short. The trial judge agreed that there was no flagrant violation, as did a majority of the intermediate appellate court. See Brief for Petitioner 3-5.

There are, of course, many areas of law where a person's conduct is judged according to general standards where application to a particular case is a matter of opinion. See *Johnson* v. *United States*, 576 U. S. __, 135 S. Ct. 2551, 2561, 192 L. Ed. 2d 569, 582-583 (2015). For most fuzzy lines in the law, though, the conduct close to the sanction line is conduct society wants to discourage. When a person injures another in an auto accident, for example, recklessness may be criminal, negligence may be actionable in tort, and something a bit short of actionable negligence is still poor driving. The lines between these stages are fuzzy, but there is not a fuzzy line between what a good driver should do and what you can go to jail for. That is a wide gulf. If the vague definition of recklessness and a severe sanction for it deters some conduct that is not reckless, that conduct is at least negligent, and the overdeterrence has no ill effect.

Not so with search and seizure. The line between reasonable suspicion and a tad less is the line between commendable performance of duty and violation of fundamental law. Once the quantum of evidence of criminal conduct reaches the threshold the Constitution requires, society's interest in enforcement of the law makes a search a desirable action and one we do not want to discourage. Overdeterrence effectively moves the constitutional line from where the Constitution places it, depriving the people of the ability to decide through the democratic process how they want their police to balance the interests of privacy and law enforcement.

Professor LaFave argues that a good-faith exception rewards police departments for poor training. See 1 LaFave § 1.2(d), pp. 58-59. His argument assumes that the line is knowable and that sufficient training will enable police to know and not guess where it is. Not so. The police department could buy every officer his own copy of Professor LaFave's six-volume treatise and give him six months off with pay to read it cover-to-cover, and the officer still could not predict how a court will rule on probable cause in a close case.

The exclusionary rule is a sanction that this Court, not the Constitution itself, has imposed on law enforcement when a search or seizure is determined to have exceeded the limits set by the Fourth Amendment. If this sanction were to be were judged by the same standards as the criminal sanctions society imposes on defendants, it would be unconstitutional. The sanction is, in many cases, grossly disproportionate to the offense. Cf. *Kennedy* v. *Louisiana*, 554 U. S. 407, 419 (2008). Briefly stopping a person on a sidewalk and asking for identification, in the good-faith and very nearly correct belief that one has the required reasonable suspicion that criminal activity is afoot, is a trivial

offense. Yet society as a whole, the officer's employer, is deprived of its ability to enforce the law as a sanction. While in this case the defendant's offense is also relatively minor, that is not always so, as noted in Part II, *supra*.

The exclusionary rule as it presently exists has no proportionality requirement, and as a result it can produce a grossly disproportionate sanction. It is one thing for a criminal to go free because a police officer willingly, recklessly, or ignorantly trampled on a constitutional right, and it is quite another to let him go free because he is determined after the fact to have transgressed a general standard in circumstances so close that the outcome may depend on which judge is assigned to the case. In such a case the injustice of letting the criminal go free may greatly exceed the injustice of letting a minor Fourth Amendment violation go unsanctioned. That is the truth behind Judge Cardozo's famous "constable blunders" statement. That is the truth that caused the people of California to abolish their state's exclusionary rule in 1982. See *California* v. *Greenwood*, 486 U. S. 35, 44-45 (1988).[7]

Overdeterrence and the disproportionate sanction of turning criminals loose for minor transgressions can largely be avoided by making the clarity of the violation an element of the defendant's suppression motion. That is, a defendant moving to suppress the product of a search or seizure must establish that the search or seizure was clearly a violation of the law as clearly established at the time. This is essentially the

---

7. In so doing, the people of California abrogated a decision heavily relied on by the *Mapp* Court as evidence of a movement in favor of exclusion. See *Mapp*, 367 U. S., at 651-653. When the people of California got to vote on exclusion directly, they rejected it.

same standard that applies at present in qualified immunity cases. See *Anderson* v. *Creighton*, 483 U. S. 635, 641 (1987).

The obvious counter-argument is that requiring clarity for suppression would result in underdeterrence on the other side of the gray zone. That is, police could "get away with" searches and seizures when their evidence is actually somewhat short of the constitutional standard of probable cause or reasonable suspicion. A necessary component of this argument is that other remedies are inadequate, at least as they presently exist.

One answer to this argument is that a lack of deterrence of minor violations just barely on the wrong side of the line, such as the stop in the present case, is the lesser evil. A second answer is that other remedies do not need to remain in their present state.

Congress has authorized federal courts to provide the same remedy that was understood to be the sole remedy in the Founding era — civil liability. See 42 U. S. C. § 1983. It has addressed the problem of the amounts in controversy being too small to make legal representation feasible by providing for awards of attorneys' fees. See 42 U. S. C. § 1988; *Hudson* v. *Michigan*, 547 U. S. 586, 597-598 (2006).

If the § 1983 civil remedy is inadequate, it is not because of anything in the text of the statute. The principal barriers to recovery are created in decisions of this Court denying respondeat superior liability for the employing agency, *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 691 (1978), and providing qualified immunity for the individual officer. *Anderson*, 483 U. S., at 638-639. *Amicus* would not suggest diminishing qualified immunity for officers. The officers who protect us are taking enough flak from

enough directions already without adding personal liability for good-faith searches. However, if a remedy gap exists, and if it is thought constitutionally necessary to fill it, further tweaking the *Monell* rule seems to be a better candidate than suppressing evidence in criminal cases.

If this Court must shape remedies to enforce search and seizure rights as incorporated in the Fourteenth Amendment, and if it must choose between civil liability and suppression of evidence in criminal cases, which should it choose? We should keep in mind that the Fourteenth Amendment itself expressly vests the power to enforce it in Congress. U. S. Const., Amdt. 14, § 5. On one hand we have the remedy that was understood to be the sole remedy in the founding era *and* has been expressly authorized by Congress. On the other hand we have a remedy that is neither. The choice is obvious.

In the present case, the standard of reasonable suspicion for a brief stop was clearly established law. See *Terry* v. *Ohio*, 392 U. S. 1 (1968). Detective Fackrell could reasonably believe that he had reasonable suspicion under that standard, and therefore the evidence should not be suppressed. Cf. *Anderson*, 483 U. S., at 641 (qualified immunity in similar circumstances).

CONCLUSION

The decision of the Supreme Court of Utah should be reversed.

December, 2015

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

Supreme Court, U.S.
FILED
JAN 29 2016
OFFICE OF THE CLERK

No. 14-1373

IN THE
Supreme Court of the United States

STATE OF UTAH,

Petitioner,

v

EDWARD JOSEPH STRIEFF, JR.,

Respondent.

On Writ of Certiorari to the Supreme Court of Utah

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND TWENTY-ONE TECHNICAL EXPERTS AND LEGAL SCHOLARS IN SUPPORT OF RESPONDENT

MARC ROTENBERG
Counsel of Record
ALAN BUTLER
CAITRIONA FITZGERALD
CLAIRE GARTLAND
AIMEE THOMSON
ELECTRONIC PRIVACY
INFORMATION CENTER (EPIC)
1718 Connecticut Ave. N.W
Suite 200
Washington, DC 20009
(202) 483-1140
rotenberg@epic.org

January 29, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF THE *AMICI CURIAE* 1
SUMMARY OF THE ARGUMENT 4
ARGUMENT 5
I. Law enforcement agencies now have access to enormous databases of personal information that lack sufficient safeguards to ensure accuracy and reliability 6
A. Law enforcement agencies are routinely collecting personal information about ordinary citizens. 9
B. Privacy Act exemptions and inaccurate data undermine the accuracy and reliability of determinations made by police. 21
1. The federal government has exempted itself from maintaining accurate and timely records for many of its largest criminal justice databases. 22
2. Government databases are notorious for containing inaccurate and out-of-date records. 25
II. Overturning the decision below would permit suspicionless identification and defeat the protections established in *Hiibel* and *Terry*. 31
A. This Court has not permitted compelled identification absent reasonable articulable suspicion. 31
B. Admitting the evidence in this case would create an end-run around the reasonable suspicion standards in *Hiibel* and *Terry*.... 33
CONCLUSION 39

TABLE OF AUTHORITIES

CASES

Arizona v. Evans, 514 U.S. 1 (1996) (O'Connor, J., concurring) 38

City of Los Angeles, Cal. v. Patel, 135 S. Ct. 2443 (2015) 5

Doe v. Chao, 540 U.S. 614 (2004) 23

Dunaway v. New York, 442 U.S. 200 (1979) 32

Florida v. Royer, 460 U.S. 491 (1983) 32

Heien v. North Carolina, 135 S. Ct. 530 (2014) 37

Hiibel v. Sixth Judicial Dist. Court of Nev., Humbolt Cty., 542 U.S. 177 (2004) 31, 32, 33, 34

Ibrahim v. DHS, 62 F Supp. 3d 909 (N.D. Cal. 2014) 30

Illinois v. Wardlow, 528 U.S. 119 (2000) 6

Riley v. California, 134 S. Ct. 2473 (2014) 33

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 5

Spokeo, Inc. v. Robins, No. 13-1339 (U.S. argued Nov. 2, 2015) 27

State v. Strieff, 357 P.3d 532 (Utah 2015) 34

Terry v. Ohio, 392 U.S. 1 (1968) 5, 6, 32, 33

United States v. Place, 462 U.S. 696 (1983) 32

United States v. Sharpe, 470 U.S. 675 (1985) 32, 33

Virginia v. Moore, 553 U.S. 164 (2008) 5

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 5

STATUTES

28 U.S.C. § 534 8

5 U.S.C. § 552a(c)(3) 24

5 U.S.C. § 552a(d) 23
5 U.S.C. § 552a(e)(1) 24
5 U.S.C. § 552a(e)(4)(I) 24
5 U.S.C. § 552a(e)(5) 23
725 Ill. Comp. Stat. 5/107–14 (2015)..... 35
Ala. Code § 15-5-30 (2015)..... 34
Ariz. Rev. Stat. Ann. § 13-2412 (2015)..... 34
Ariz. Rev. Stat. Ann. § 28-1595 (2015)..... 34
Ark. Code Ann. § 5–71–213(a)(1) (2015)..... 34
Colo. Rev Stat. § 16-3-103 (2015) 35
Del. Code Ann. tit. 11, § 1321(6) (2016)..... 35
Del. Code Ann. tit. 11, § 1902(a) (2016)..... 35
Fla. Stat. § 856.021(2) (2015) 35
Fla. Stat. § 901.151 (2015)..... 35
Ga. Code Ann. § 16–11–36(b) (2015)..... 35
Ind. Code § 34-28-5-3.5 (2014)..... 35
Kan. Stat. Ann. § 22–2402(1) (2015)..... 35
La. Code Crim. Proc. Ann. art. 215.1(A) (2015)..... 35
Mo. Rev. Stat. § 84.710(2) (2015) 35
Mont. Code Ann. § 46–5–401(2)(a) (2015) 35
N.D. Cent. Code § 29–29–21 (2015) 36
N.H. Rev Stat. Ann. § 594:2 (Lexis 2015) 36
N.H. Rev. Stat. Ann. § 644:6 (Lexis 2015) 36
N.M. Stat. Ann. § 30–22–3 (2015)..... 36
N.Y. Crim. Proc. Law § 140.50(1) (McKinney 2015) 36
Neb. Rev. Stat. § 29–829 (2015) 35
Nev. Rev. Stat. § 171.123 (2015) 36
Ohio Rev. Code Ann. § 2921.29 (LexisNexis 2015) .. 36

R.I. Gen. Laws § 12–7–1 (2015) 36
Utah Code Ann. § 77–7–15 (2015) 36
Vt. Stat. Ann. tit. 24, § 1983 (2015) 36
Wis. Stat. § 968.24 (2015) 36

REGULATIONS

28 C.F.R. § 16.96(a) 23
28 C.F.R. § 16.96(g) 23
28 C.F.R. § 16.96(r) 23
28 C.F.R. § 16.96(t) 23
28 C.F.R. § 16.96(v) 23, 25
49 C.F.R. § 1507.3(k) 23, 25
6 C.F.R. pt. 5, App. C 45 ..... 23, 25
6 C.F.R. pt. 5, App. C 69 ..... 23, 25

OTHER AUTHORITIES

4 Wayne R. LeFave, *Search and Seizure* (5th ed. 2012) 5

Ben Popper, *How The NYPD Is Using Social Media to Put Harlem Teens Behind Bars*, Verge (Dec. 10, 2014) 30

Comm. on Privacy in the Info. Age, Nat'l Research Council, *Engaging Privacy and Information Technology in the Digital Age* (James Waldo et al. eds. 2007) 6, 7, 21, 28

Criminal Justice Info. Servs. Div., FBI, *Annual Report 2015* (2015) 11

Criminal Justice Info. Servs. Div., FBI, *Next Generation Identification* (2015) 10, 11

DHS, *2014 National Network of Fusion Centers Final Report* (Jan. 2015) 13

DHS, *Automated Targeting System* (Aug. 3, 2007) .. 19

DHS, *Privacy Impact Assessment for the Analytical Framework for Intelligence (AFI)* (June 1, 2012) 20

DHS, *Privacy Impact Assessment for the Secure Flight Program* (Aug. 9, 2007) 19

DHS, *Privacy Impact Assessment Update for the Automated Targeting System—TSA/CBP Common Operating Procedure Phase II*, DHS/CBP/PIA-006(d) (Sept. 16, 2014) 19, 20, 28

DOJ, *Fusion Center Guidelines* (Aug. 2006) 13, 14, 15, 27

EPIC, *Automated Targeting System* (2016) 20

EPIC, *Documents Show Errors in TSA's "No Fly" and "Selectee" Watch Lists* (Mar. 26, 2006) 19

EPIC, *EPIC v. CBP (Analytical Framework for Intelligence)* (2016) 20

EPIC, *EPIC v. Virginia Department of State Police: Fusion Center Secrecy Bill* (2016) 17

EPIC, *Information Fusion Centers and Privacy* (2016) 13

EPIC, *Passenger Profiling* (2016) 18

EPIC, *Secure Flight* (2016) 18

Exec. Office of the President, *Big Data: Seizing Opportunities, Preserving Values* (2014) 7

FBI, *Interoperability Initiatives Unit (IIU)* 29

FBI, *National Crime Information Center* 8, 9

FBI, *Next Generation Identification (NGI) Monthly Fact Sheet* (2015) 10, 11

FBI, *Privacy Impact Assessment for Next Generation Identification (NGI) – Retention and Searching of Noncriminal Justice Fingerprint Submissions* (Feb. 20, 2015) 10

FBI, *Privacy Impact Assessment for the National Data Exchange (N-DEx) System* (May 9, 2014) 11, 12

G.W. Schultz, *Maryland to Store License-Plate Scanner Data at Intel Fusion Center*, Ctr. For Investigative Reporting (Aug. 9, 2010) 15

H.B. 1007, 2008 Gen. Assem., Spec. Sess. (Va. 2008) 16

Intellicheck, *Solutions Brief: Law Enforcement* (2015) 9

Interoperability Means Success for All Law Enforcement, CJIS Link (FBI, Washington, D.C.) 29

Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 Minn. L. Rev. 1 (2008) 7

John Markoff, *Pentagon Plans a Computer System That Would Peek at Personal Data of Americans*, N.Y. Times (Nov. 9, 2002) 14

Jordan Graham, *Boston Police to Update Traffic Stop Database*, Gov't Tech. (Jan. 20, 2016) 26

Justin Jouvenal, *The New Way Police Are Surveilling You: Calculating Your Threat 'Score'*, Wash. Post (Jan. 10, 2016) 7, 20, 21

Kalev Leetaru, *Policing Meets Big Data: A Lesson In Sentiment Mining, Data Recency And Dashboards*, Forbes (Jan. 17, 2016) 29

LexisNexis Special Services Inc., *What We Do* (2015) 27

Madeline Neighly & Maurice Emsellem, *Wanted: Accurate FBI Background Checks for Employment*, Nat'l Emp't Law Ctr. (July 2013) 27

Meredith Broussard, *When Cops Check Facebook*, Atlantic (Apr. 19, 2015) 30

Nat'l Archives, *FBI Central Records System* 12

Office of Tech. Assessment, U.S. Congress, *A Preliminary Assessment of the National Crime Information Center and the Computerized Criminal History System* (1978) 8

Press Release, Criminal Justice Info. Servs. Div., FBI Announces Full Operational Capability of the Next Generation Identification System (Sept. 15, 2014) 10

Privacy Act of 1974; Notice of Modified Systems of Records, 63 Fed. Reg. 8659 (Feb. 20, 1998) 12

Privacy Act of 1974; Notice of Modified Systems of Records, 64 Fed. Reg. 52,343 (Sept. 28, 1999) 26

Privacy Act of 1974; System of Records, 77 Fed. Reg. 40,630 (July 10, 2012) 13

Privacy Act of 1974: Department of Homeland Security Office of Operations Coordination and Planning–003 Operations Collection, Planning, Coordination, Reporting, Analysis, and Fusion System of Records, 75 Fed. Reg. 69,689 (Nov. 15, 2010) 16

Privacy Act of 1974: Implementation, 77 Fed. Reg. 61,275 (Oct. 9, 2012) 13

Raymond Bonner, *"No-Fly List" Riddled with Errors, Impossible to Get Off of*, Informed Comment (Dec. 16, 2015) 30

S. Rep. No. 93-1183 (1974) 22

Staff of Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Governmental Affairs, 112th Cong., *Rep. on Federal Support for and Involvement in State and Local Fusion Center* (2012) 26

Staff Statement No. 3, The Aviation Security System and the 9/11 Attacks: Seventh Public Hearing of the Nat'l Comm'n on Terrorist Attacks Upon the U.S. 6 (Jan. 2004) 18

The Future of Fusion Centers: Potential Promise and Dangers: Hearings Before the Subcomm on Intelligence, Info. Sharing & Terrorism Risk Assessment of the H. Comm. on Homeland Sec., 111th Cong. (2010)..... 16

Timothy Williams, *Facial Recognition Software Moves From Overseas Wars to Local Police*, N.Y. Times (Aug. 12, 2015)..... 26

Todd Masse, Siobhan O'Neil & John Rollins, Cong. Research Serv., RL34070, *Fusion Centers: Issues and Options for Congress* (July 6, 2007)..... 14

TSA, TSA to Test New Passenger Pre-Screening Program (Aug. 26, 2004) 18, 28

U.S. Dep't of Health, Educ. & Welfare, *Report of the Secretary's Advisory Committee on Automated Personal Data Systems, Records, Computers, and the Rights of Citizens* (1973) 22

U.S. Gov't Accountability Office, GAO-04-385, *Aviation Security: Computer-Assisted Passenger Prescreening Program Faces Significant Implementation Challenges* (2004) 18, 28

U.S. Gov't Accountability Office, GAO-15-162, *Criminal History Records, Additional Actions Could Enhance the Completeness of Records Used for Employment-Related Background Checks* (2015)..... 27, 28

William J. Krouse, Cong. Research Serv., R42336, *Terrorist Watch List Screening and Background Checks for Firearms* (2013) 28

William Safire, *You Are a Suspect*, N.Y. Times (Nov. 14, 2002) 14

INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C.[1] EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.

EPIC routinely participates as *amicus curiae* before this Court in cases concerning emerging privacy and civil liberties issues. *See, e.g.*, *Spokeo, Inc. v. Robins*, No. 13-1339 (filed Sept. 8, 2015) (arguing that the violation of a consumer's privacy rights under federal law constitutes an injury-in-fact sufficient to confer Article III standing); *City of Los Angeles, Cal. v. Patel*, 135 S. Ct. 2443 (2015) (arguing that hotel guest registries should not be made available for inspection absent judicial review); *Riley v. California*, 134 S. Ct. 2473 (2014) (arguing that the of search a cell phone incident to arrest requires a warrant); *United States v. Jones*, 132 S. Ct. 945 (2012) (arguing that a warrant is required for the use of GPS tracking techniques); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (arguing that the privacy interest in medical records justifies regulating datamining of prescription records); *Tolentino v. New York*, 562 U.S. 1043, (2010) (arguing that evidence

---

[1] Both parties consent to the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

obtained from defendant's identity should be suppressed when discovered as a result of an unlawful stop), *dismissed as improvidently granted*, 563 U.S. 123 (2011); *Doe v. Reed*, 561 U.S. 186 (2010) (arguing that state law should not force the disclosure of petition signatories); *Herring v. United States*, 555 U.S. 135 (2009) (arguing for the suppression of evidence obtained as the result of an error in a criminal justice database); *Hiibel v. Sixth Judicial Dist. Ct. of Nevada, Humboldt Cty.*, 542 U.S. 177 (2004) (arguing that identification may not b compelled absent probable cause to arrest); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Stratton, Ohio*, 536 U.S. 150 (2002) (arguing that door-to-door petitioners should not have to obtain a permit and identify themselves).

Technical Experts and Legal Scholars

Alessandro Acquisti, Associate Professor, Information Technology and Public Policy, Carnegie Mellon University

Colin J. Bennett, Professor, University of Victoria

Dr. Whitfield Diffie, Visiting Scholar, Stanford, Center for International Security and Cooperation

Cynthia Dwork, Distinguished Scientist, Microsoft Research

Addison Fischer, Founder and Chairman, Fischer International Corp.

Hon. David Flaherty, former Information and Privacy Commissioner for British Columbia

Deborah Hurley, Institute for Qualitative Social Science, Harvard University

Ian Kerr, Canada Research Chair in Ethics, Law & Technology, University of Ottawa, Faculty of Law

Chris Larsen, CEO, Ripple, Inc.

Harry R. Lewis, Gordon McKay Professor of Computer Science, Harvard University

Dr. Pablo Garcia Molina, Adjunct Professor, Georgetown University

Peter G. Neumann, Senior Principal Scientist, SRI International

Helen Nissenbaum, Professor, Director of the Information Law Institute, New York University

Dr. Deborah Peel, M.D., Founder and Chair, Patient Privacy Rights

Chip Pitts, Chair, EPIC Board of Directors; Lecturer in Law, Stanford Law School

Bruce Schneier, Security Technologist; Author, Schneier on Security (2008)

Robert Ellis Smith, Publisher, Privacy Journal

Nadine Strossen, John Marshall Harlan II Professor of Law, New York Law School, Former President, American Civil Liberties Union

Frank Tuerkheimer, Professor of Law Emeritus, University of Wisconsin Law School

Sherry Turkle, Abby Rockefeller Mauzé Professor, MIT

Edward G. Vlitz, President and Chairman, Internet Collaboration Coalition

(Affiliations are for identification only)

SUMMARY OF THE ARGUMENT

This case asks whether information available in the many thousands of government databases may provide *post hoc* justification for an unlawful detention. Recognizing the "digital Pandora's box" that such a practice would open, the answer must be "no."

A name is now no longer a simple identifier: it is the key to a vast, cross-referenced system of public and private databases that lay bare the most intimate features of an individual's life. If any person can be coerced by the state to hand over this key to the police, absent reasonable suspicion, then the protections of the Fourth Amendment have been rendered illusory.

Law enforcement databases now provide police officers with unprecedented access to details about the private lives of Americans. These databases contain not just outstanding warrants, but also personal financial and medical information, education records, property records, and Internet logs entirely unrelated to a criminal investigation. And much of the information in these databases is inaccurate, incomplete, and out of date.

Overturning the lower court decision in this case would permit compelled identification and the trolling of government databases, even after an unlawful detention. This goes far beyond what the Court permitted in *Hiibel* and *Terry*. As law enforcement databases continue to expand, there is an increased risk that the interest in accessing these databases will incentivize unlawful detentions.

ARGUMENT

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV As this Court has recognized, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (internal quotation marks omitted).

Searches and seizures conducted without a warrant or probable cause are "*per se* unreasonable[,] subject only to a few specifically established and well-delineated exceptions." *City of Los Angeles, Cal. v. Patel*, 135 S. Ct. 2443, 2452 (2015) (internal quotation marks omitted). However, courts have recognized three tiers of police-citizen encounters that are permissible absent a warrant. *See* 4 Wayne R. LeFave, *Search and Seizure* § 9.4(e) (5th ed. 2012).

Tier one encounters involve consensual communications between an officer and citizen, which do not require probable cause or a warrant so long as the consent is voluntary and not "the product of duress or coercion, express or implied." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

Tier three encounters rise to the level of arrest and are permitted if the officer has probable cause to believe that the individual has committed a crime in her presence, *Virginia v. Moore*, 553 U.S. 164, 178 (2008), or if she has probable cause to believe the person has committed a felony, *United States. v. Watson*, 423 U.S. 411, 421–23 (1976).

Tier two interactions, or "investigatory stops," occur when an officer briefly detains an individual without a warrant or probable cause. These stops are permissible only if the officer "has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000); *accord. Terry v. Ohio*, 392 U.S. 1, 21 (1968). The officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21.

Allowing information obtained from running an ID to attenuate the taint of unlawful activity will effectively eviscerate the requirement that investigatory stops be based on reasonable articulable suspicion. The growing size and scope of government databases means that running an ID will soon give the police access to information providing a *post hoc* justification for any police encounter, regardless of the initial level of suspicion.

I. Law enforcement agencies now have access to enormous databases of personal information that lack sufficient safeguards to ensure accuracy and reliability.

The accumulation of personal information stored in law enforcement databases is accelerating. There has been a dramatic increase in "the amount of digital information generated and stored about everyone." Comm. on Privacy in the Info. Age, Nat'l Research Council, *Engaging Privacy and Information Technology in the Digital Age* 272 (James Waldo et al. eds. 2007) [hereinafter "NRC *Engaging Privacy* Report"]. "Almost every activity in modern life, from

grocery shopping to surfing the Web to making a phone call, generates some record in a database somewhere." *Id.* at 271–72. Federal and state law enforcement agencies are increasingly gathering data to investigate crime and to make predictions about future crimes. Exec. Office of the President, *Big Data: Seizing Opportunities, Preserving Values* 29 (2014). Law enforcement officers have easy access to a broad array of information including criminal investigative records, travel and immigration records, and threat assessments. *See* Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 Minn. L. Rev. 1, 10–14 (2008) (describing the rise in government data collection and risk profiling based on non-criminal conduct). Many of these systems were created to serve important law enforcement purposes, but their use over time has expanded and there are not sufficient protections to ensure that the data is accurate and reliable.

Law enforcement databases have grown increasingly complex over the last two decades. Risk scores are now assigned to individuals without any criminal past. Justin Jouvenal, *The New Way Police Are Surveilling You: Calculating Your Threat 'Score'*, Wash. Post (Jan. 10, 2016).[2] Local law enforcement surveillance "creates vast amounts of data, which is increasingly pooled in local, regional and national databases." *Id.*

---

[2] https://www.washingtonpost.com/local/public-safety/the-new-way-police-are-surveilling-you-calculating-your-threat-score/2016/01/10/e42bccac-8e15-11e5-baf4-bdf37355da0c_story.html?hpid=hp_rhp-top-table-main_policesurvellance920p:homepage/story.

The development of criminal justice information systems in the United States has been ongoing for almost 50 years. In 1967, federal and local law enforcement agencies launched the National Crime Information Center ("NCIC"), a "nationwide information network operated by the Federal Bureau of Investigation" to provide access to "criminal justice information among federal, state, and local agencies." Office of Tech. Assessment, U.S. Congress, *A Preliminary Assessment of the National Crime Information Center and the Computerized Criminal History System* 3, 5 (1978) [hereinafter "1978 OTA Report"].

In the beginning, the NCIC contained only 356,784 records in five "file" categories. FBI, *National Crime Information Center*.[3] Ten years later, the database had integrated eight files including information from the Computer Criminal History system, which had more than 1,000,000 entries. 1978 OTA Report, *supra*, at 7. Today the NCIC has more than 13 million active records organized in 21 files. FBI, *National Criminal Information Center*, *supra*. States, cities, tribal agencies, sentencing commissions, penal institutions, railroad police departments, and private university police departments can now access the NCIC database. 28 U.S.C. § 534.

New systems have now been developed that enable law enforcement officers to search records from NCIC and other law enforcement databases

---

[3] https://www.fbi.gov/about-us/cjis/ncic (last visited Jan. 27, 2016).

directly from a mobile device. *See* Intellicheck, *Solutions Brief: Law Enforcement* (2015).[4] The FBI reports that during 2014 the NCIC "averaged 12 million transactions per day." FBI, *National Crime Information Center*, *supra*.

A. Law enforcement agencies are routinely collecting personal information about ordinary citizens.

Not everyone is a criminal or even a suspect, but everyone in the United States will eventually show up in one of the many databases maintained by federal and state law enforcement agencies. These records are no longer limited in geographic scope or subject matter—they are more than arrest and warrant records. Routine activities are subject to data gathering and analysis. And all of the data gathered is increasingly being compiled and analyzed in an attempt to flag suspicious patterns or behaviors.

1. FBI Databases

The FBI has recently created one of the largest collections of biometric identification data in the world, the Next Generation Identification ("NGI") system. Press Release, Criminal Justice Info. Servs. Div., FBI Announces Full Operational Capability of the Next Generation Identification System (Sept. 15,

---

[4] http://intellicheck.com/wp-content/uploads/2015/07/Law-ID-Solutions-Brief.pdf.

2014).[5] The NGI system was developed to expand the biometric identification capabilities of, and ultimately replace, the Integrated Automated Fingerprint Identification System, and to provide broader data collection capabilities. *Id.* As of December 2015, the NGI database contains more than 38 million civilian fingerprints (submitted for employment and licensing background checks) and more than 70 million criminal histories and fingerprints. FBI, *Next Generation Identification (NGI) Monthly Fact Sheet* (2015).[6] DOJ components and federal entities, as well as state, local, and tribal government entities, have direct access to these fingerprints. FBI, *Privacy Impact Assessment for Next Generation Identification (NGI) – Retention and Searching of Noncriminal Justice Fingerprint Submissions* (Feb. 20, 2015).[7]

In addition to fingerprints, the NGI database also stores iris scans, palm prints, and photographs of individuals. Criminal Justice Info. Servs. Div., FBI, *Next Generation Identification* 2 (2015).[8] The system includes facial recognition capabilities that analyze collected images, including over 23 million

---

[5] https://www.fbi.gov/news/pressrel/press-releases/fbi-announces-full-operational-capability-of-the-next-generation-identification-system.

[6] https://www.fbi.gov/about-us/cjis/fingerprints_biometrics/ngi/december-2015-ngi-fact-sheet.pdf.

[7] https://www.fbi.gov/foia/privacy-impact-assessments/next-generation-identification-ngi-retention-and-searching-of-noncriminal-justice-fingerprint-submissions.

[8] https://www.fbi.gov/about-us/cjis/fingerprints_biometrics/biometric-center-of-excellence/files/ngi-one-pager-final.pdf.

front-facing photos currently stored in the database. *Id.* There were more than one million civilian photos, and nearly one million mugshot photos, added to NGI in 2015 alone. FBI, *Next Generation Identification (NGI) Monthly Fact Sheet*, *supra*.

In addition to the NGI and NCIC systems, the FBI also maintains a central repository of "information from local, state, regional, tribal, and federal criminal justice entities" called the National Data Exchange ("N-DEx"). FBI, *Privacy Impact Assessment for the National Data Exchange (N-DEx) System* (May 9, 2014) [hereinafter "FBI N-DEx PIA"].[9] The N-DEx database contains more than 500 million records, which are searched more than 315,000 times per month. Criminal Justice Info. Servs. Div., FBI, *Annual Report 2015*, at 11 (2015).[10]

The data in the N-DEx system includes personally identifiable information of "suspects, perpetrators, witnesses and victims, and anyone else who may be identified in a law enforcement report concerning a crime incident or criminal investigation." FBI N-DEx PIA, *supra*. Much of the information stored in N-DEx "is sensitive, and in the case of victim and witness information, it is highly sensitive." *Id.* The records in this database consist of incident, offense, and case reports, as well as arrest, booking, incarceration, and parole or probation

---

[9] https://www.fbi.gov/foia/privacy-impact-assessments/N-DEx.

[10] https://www.fbi.gov/about-us/cjis/annual-report-2015/2015_cjis_annual_report.pdf.

information from federal, state, local, and tribal law enforcement entities. *Id.* They include personal information such as an individual's name, sex, race, citizenship, date of birth, address, telephone number, Social Security Number, physical description, occupation, and vehicle information. *Id.* The FBI has acknowledged that increased disclosure of these records could pose significant privacy risks, but nevertheless the agency has provided automated access to its law enforcement partners. *Id.*

The FBI has sought to link its records even further by creating a Central Records System ("CRS"). Privacy Act of 1974; Notice of Modified Systems of Records, 63 Fed. Reg. 8659, 8671 (Feb. 20, 1998); *see also* Nat'l Archives, *FBI Central Records System*.[11] "Almost all FBI records are part of a case file in the CRS," Nat'l Archives, *supra*, and the CRS contains 281 categories of records. 63 Fed. Reg. at 8671. Individuals covered by CRS include individuals "who relate in any manner to official FBI investigations," including "subjects, suspects, victims, witnesses, and close relatives and associates who are relevant to an investigation." 63 Fed. Reg. at 8671. The CRS also includes records about "individuals who are the subject of unsolicited information, who offer unsolicited information, request assistance, and make inquiries concerning record material, including general correspondence, and contacts with other agencies, businesses, institutions, clubs; the public and the news media." *Id.* More recently the FBI has also moved to consolidate its warehoused records into

---

[11] https://www.archives.gov/research/investigations/fbi/central-records.html (last visited Jan. 26, 2016).

a centralized system, the FBI Data Warehouse. Privacy Act of 1974; System of Records, 77 Fed. Reg. 40,630, 40,631 (July 10, 2012); Privacy Act of 1974: Implementation, 77 Fed. Reg. 61,275, 61,275–76 (Oct. 9, 2012).

2. Fusion Centers

The Department of Justice and Department of Homeland Security are now making far more detailed personal information available to federal, state, and local law enforcement agencies than what was traditionally available in criminal justice records. Fusion centers, which operate at the local level, combine records from federal and state agencies, and government and private record systems. There are currently 78 fusion centers nationwide: 53 at the state level and 25 in major urban areas. DHS, *2014 National Network of Fusion Centers Final Report* 9 (Jan. 2015).[12] The fusion centers vary widely in size, funding, and operations. DOJ, *Fusion Center Guidelines* 3 (Aug. 2006) [hereinafter "Fusion Center Guidelines."].[13]

The term "fusion center" was first coined by the Department of Defense and refers to the fusing of information from different sources—public and private—for analysis purposes. *See* EPIC, *Information Fusion Centers and Privacy* (2016).[14] In

---

[12] http://www.dhs.gov/sites/default/files/publications/2014%20National%20Network%20of%20Fusion%20Centers%20Final%20Report_1.pdf.

[13] http://it.ojp.gov/documents/d/fusion_center_guidelines.pdf.

[14] https://www.epic.org/privacy/fusion/.

2002, the New York Times reported on the first fusion center project, managed by the Defense Advanced Research Project Agency. John Markoff, *Pentagon Plans a Computer System That Would Peek at Personal Data of Americans*, N.Y. Times (Nov. 9, 2002);[15] *see also*, William Safire, *You Are a Suspect*, N.Y. Times (Nov. 14, 2002).[16] Through the project, known as Total Information Awareness, the agency planned to "provide intelligence analysts and law enforcement officials with instant access to information from Internet mail and calling records to credit card and banking transactions and travel documents, without a search warrant." Markoff, *supra*.

Fusion centers began as the outgrowth of state-based intelligence analysis units, reviewing numerous streams of data from a variety of state-based sources. Todd Masse, Siobhan O'Neil & John Rollins, Cong. Research Serv., RL34070, *Fusion Centers: Issues and Options for Congress* 18–19 (July 6, 2007). Starting in 2006, the Department of Justice recommended that state fusion centers collect a broad range of data, including the personal information concerning individuals who are not suspected of any crime. Fusion Center Guidelines, *supra*, at 2.

The guidelines, subsequently developed by DHS and DOJ, continue to emphasize maximum information gathering and exchange involving "every

---

[15] http://www.nytimes.com/2002/11/09/politics/09COMP.html.

[16] http://www.nytimes.com/2002/11/14/opinion/you-are-a-suspect.html.

level and discipline of government, private sector entities, and the public." Fusion Center Guidelines, *supra*. Centers are encouraged to "fuse" a wide swath of data from government and private entities, including suspicious activity reports, fraudulent banking transactions, unemployment checks, firearm licenses, criminal histories, gang activity, credit reports, department of motor vehicle records, public health data, law enforcement investigation records, and probation, parole, and booking information from police and correctional institutions. *Id.* at Appendix C. States are now implementing programs that provide patrol cars with access to "fusion center" databases. G.W. Schultz, *Maryland to Store License-Plate Scanner Data at Intel Fusion Center*, Ctr. For Investigative Reporting (Aug. 9, 2010).[17]

The DOJ recommends that state fusion centers capture personal data about individuals by accessing a variety of government and commercial systems. Fusion Center Guidelines, *supra*, at 33–34. The DHS assists states in retrieving this information by identifying "key players" and intelligence requirements, facilitating information dissemination between different government agencies, and "provid[ing] security clearances to appropriate members of private sector leadership." *The Future of Fusion Centers: Potential Promise and Dangers: Hearings Before the Subcomm on Intelligence, Info. Sharing & Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 111th Cong. 16 (2010)

---

[17] http://www.centerforinvestigativereporting.org/blogpost/20100809marylandtostorelicenseplatescannerdataatintelfusioncenter.

(statement of Robert Riegle, Director, State and Local Program Office, Office of Intelligence and Analysis, DHS) [hereinafter "Riegle Fusion Center Statement"].

In 2010, the DHS established a new Federal Fusion Center and exempted all disclosures to state and local fusion centers from Federal Privacy Act obligations. Privacy Act of 1974: Department of Homeland Security Office of Operations Coordination and Planning–003 Operations Collection, Planning, Coordination, Reporting, Analysis, and Fusion System of Records, 75 Fed. Reg. 69,689 (Nov. 15, 2010). Going forward, DHS intends to establish a national fusion network. Riegle Fusion Center Statement, *supra*, at 35–36.

This increased data dissemination is problematic for many reasons, including the fact that fusion centers rely on information collected from government and commercial systems that can contain unreliable data. *See infra* Part I.B. Moreover, law enforcement personnel make use of these new integrated state databases even as states are suspending the privacy obligations and open government requirements that would otherwise require public accountability in the management of these systems. In the state of Virginia, for example, legislation was enacted that suspended the application of the Virginia Freedom of Information Act and the Virginia Collection and Dissemination Practices Act to the Virginia Fusion Center. H.B. 1007, 2008 Gen. Assem., Spec. Sess. (Va. 2008). *See* EPIC, *EPIC v. Virginia Department of State Police:*

Fusion Center Secrecy Bill (2016)[18] (revealing an MOU between the FBI and the Virginia State Police that required modifications in the state open records and privacy laws to permit the establishment of a fusion center in Virginia).

3. DHS Databases and Risk Profiling

Police also have access to programs that provide information not only about outstanding warrants, but also about speculative and secretive "scoring" of individuals. Fusion centers and other federal systems are increasingly providing local law enforcement officers with access to data collected by the DHS, the FBI, and other federal agencies as well as "watch lists" and other speculative risk profiles. *See* Info. Sharing Envt., *Law Enforcement Information Sharing* (describing the interconnection of state and local agencies with data from NCIC, N-DEx, and the DHS LEISS network).[19] The DHS also attempts to assign risk scores to individuals based on patterns, transit records, and other personal information.

Beginning in 2003, the Transportation Security Administration ("TSA") developed a program to collect and analyze data from a variety of sources in order to "prescreen" and "classify passengers according to their level of risk." U.S. Gov't Accountability Office, GAO-04-385, *Aviation Security: Computer-Assisted Passenger Prescreening Program Faces Significant Implementation Challenges* 2

---

[18] https://epic.org/privacy/virginia_fusion/.

[19] https://www.ise.gov/law-enforcement-information-sharing (last visited Jan. 28, 2016).

(2004) [hereinafter "GAO CAPPS Report"].[20] This program was intended to replace the Computer-Assisted Passenger Prescreening System ("CAPPS") that had been established by the Federal Aviation Administration and operated by airlines in the mid 1990s to identify and screen checked baggage that might contain dangerous material. *Staff Statement No. 3, The Aviation Security System and the 9/11 Attacks: Seventh Public Hearing of the Nat'l Comm'n on Terrorist Attacks Upon the U.S.* 6 (Jan. 2004).[21] The new system, first referred to as CAPPS II, would be operated by government agencies, rather than private companies, and would use experimental data-mining algorithms to assign risk scores to individual passengers and trigger special screening procedures. *See* EPIC, *Passenger Profiling* (2016).[22]

The initial launch of CAPPS II was plagued by errors, and the program was replaced by "Secure Flight." *See* TSA, TSA to Test New Passenger Pre-Screening Program (Aug. 26, 2004);[23] *see also* EPIC, *Secure Flight* (2016).[24] Under the program, the TSA collects passenger data—including the full name, date of birth, gender, redress number, known traveler number, and passport information—and itinerary data in order to assign risk scores. DHS, *Privacy*

---

[20] http://www.gao.gov/new.items/d04385.pdf.

[21] http://www.9-11commission.gov/staff_statements/staff_statement_3.pdf.

[22] https://epic.org/privacy/airtravel/profiling.html.

[23] https://web.archive.org/web/20060412081939/http://www.tsa.gov/public/display?theme=44&content=09000519800c6c77.

[24] https://epic.org/privacy/airtravel/secureflight.html.

Impact Assessment for the Secure Flight Program 4 (Aug. 9, 2007).[25] The TSA relies heavily on FBI "watchlists" that have been known to contain significant errors. *See* EPIC, *Documents Show Errors in TSA's "No Fly" and "Selectee" Watch Lists* (Mar. 26, 2006).[26]

The DHS has also created a similar "risk-based targeting" system within U.S. Customs and Border Patrol ("CBP") called the Automated Targeting System ("ATS"). The ATS "compares traveler, cargo, and conveyance information against intelligence and other enforcement data." DHS, *Automated Targeting System* 3 (Aug. 3, 2007).[27] The ATS system collects and correlates data from cargo shipments, passenger manifests, border crossing records, airline reservations, "nonimmigrant entry" records, and other information from law enforcement databases. *Id.* The TSA's Secure Flight database and the CBP's ATS database ostensibly draw from the same watchlists, though it took the DHS seven years to resolve "inconsistencies" between the two systems. DHS, *Privacy Impact Assessment Update for the Automated Targeting System—TSA/CBP Common Operating Procedure Phase II*, DHS/CBP/PIA-006(d) (Sept. 16, 2014) [hereinafter "ATS PIA 2014"].[28] The

---

[25] http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_secureflight.pdf.

[26] https://epic.org/privacy/airtravel/foia/watchlist_foia_analysis.html.

[27] http://www.dhs.gov/sites/default/files/publications/privacy_pia_cbp_ats_updated_fr_0.pdf.

[28] http://www.dhs.gov/sites/default/files/publications/privacy_pia_cbp_tsacop_09162014.pdf.

ATS system also compares this data with "patterns" based on "officer experience, trend analysis of suspicious activity, law enforcement cases, and raw intelligence" to flag potential travelers who they feel might pose a risk. *Id.* at 1; *see also* EPIC, *Automated Targeting System* (2016).[29] The ATS system provides access to biographical information, itineraries, status, and other comments related to flagged individuals. ATS PIA 2014, *supra*, at 5.

In addition to the ATS system, CBP has developed another centralized system in an effort to identify "individuals, associations, or relationships that may pose a potential law enforcement or security risk." DHS, *Privacy Impact Assessment for the Analytical Framework for Intelligence (AFI)* 1 (June 1, 2012).[30] The primary function of AFI is to create an "index of relevant data in existing operational DHS source systems" and provide centralized access to that data based on personally identifiable information. *Id.* at 2. The AFI system also provides statistical, geospatial, temporal, and link analysis tools to review the centralized data about individuals. *Id.* at 4; *see also* EPIC, *EPIC v. CBP (Analytical Framework for Intelligence)* (2016).[31]

Local law enforcement agencies have also begun to develop their own risk profiling mechanisms. *E.g.*, Jouvenal, *supra*. For example, during a recent 911 call, the Fresno police

---

[29] https://epic.org/privacy/travel/ats/.

[30] http://www.dhs.gov/sites/default/files/publications/privacy_pia_cbp_afi_june_2012_0.pdf.

[31] https://epic.org/foia/dhs/cbp/afi/.

department used a private software program to calculate a man's "threat level" by scouring "billions of data points, including arrest reports, property records, commercial databases, deep Web searches and the man's social-media postings." *Id.*

The National Academy of Sciences has made clear that the risks of the growing complexity and scope of police databases "raise concerns about the privacy of those who are—rightly or wrongly—the targets of the new technologies." NRC *Engaging Privacy* Report, *supra*, at 254. "[T]he very fact that considerable amounts of data have been collected about individuals who have not been accused or convicted of a crime ensures that substantial amounts of information about non-criminals will end up in the databases of law enforcement agencies," even if agencies never look at or use the information. *Id.* at 253. But allowing records in databases to attenuate an unlawful police stop guarantees that this information *will* be used—used to give *post hoc* justification to evidence obtained through unlawful police activity.

B. Privacy Act exemptions and inaccurate data undermine the accuracy and reliability of determinations made by police.

Quantity, in the case of government databases, does not equal quality. Many of these databases are notorious for containing inaccurate and outdated information. The Department of Justice has made a bad problem worse by exempting its systems from key Privacy Act obligations, such as the requirement that records be accurate and timely, or that the public have an opportunity to correct the records. The

creation of criminal justice "risk scores" without transparency or scientific reliability will create a new set of problems. Overturning the decision below risks opening this "digital Pandora's box" of *post hoc* justifications for unlawful government detentions and seizures.

1. The federal government has exempted itself from maintaining accurate and timely records for many of its largest criminal justice databases.

The Department of Justice has led an effort to exempt government databases from the requirements that personal information stored by the federal government is accurate and reliable. It is inconceivable that the drafters of the Privacy Act would have permitted a federal agency to routinely collect and disseminate personal information without satisfying the accuracy and transparency requirements set out in the HEW Report. *See* U.S. Dep't of Health, Educ. & Welfare, *Report of the Secretary's Advisory Committee on Automated Personal Data Systems, Records, Computers, and the Rights of Citizens* (1973).

When Congress enacted the Privacy Act in 1974, it sought to restrict the amount of personal data that federal agencies were able to collect. S. Rep. No. 93-1183, at 1 (1974). Congress further required agencies to be transparent in their information practices. *Id.*

In *Doe v. Chao*, 540 U.S. 614 (2004), the Court underscored the importance of the Privacy Act's restrictions upon agency use of personal data to protect privacy interests, noting that "in order to

protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary . . . to regulate the collection, maintenance, use, and dissemination of information by such agencies." *Doe*, 540 U.S. at 618.

But despite the clear pronouncement from this Court on accuracy and transparency in government records, the Department of Justice and Department of Homeland Security have exempted many of their law enforcement and risk assessment systems from key Privacy Act obligations. Specifically, the FBI and DHS claim exemptions from providing the following safeguards:

- Agencies must ensure that all records used to make determinations about an individual are accurate, relevant, timely and complete as reasonably necessary to maintain fairness. 5 U.S.C. § 552a(e)(5). The FBI and DHS have exempted all of the databases identified in Part 1.A from these accuracy and relevance requirements.[32]
- Agencies must allow individuals to access and review records contained about them in the database and to correct any mistakes. 5 U.S.C. § 552a(d). But the FBI and DHS have exempted all of the databases identified in

---

[32] *See* 28 C.F.R. § 16.96(g) (NCIC); 28 C.F.R. § 16.96(t) (N-Dex); 28 C.F.R. § 16.96(a) (CRS); 28 C.F.R. § 16.96(v) (FBI Data Warehouse); 49 C.F.R. § 1507.3(k) (Secure Flight); 28 C.F.R. § 16.96(r) (TSDB); 6 C.F.R. pt. 5, App. C 45 (ATS); 6 C.F.R. pt. 5, App. C 69 (AFI).

Part I.A from these access and correction requirements.[33]

- Agencies must collect and retain only such records "about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. § 552a(e)(1). But the FBI and Department of Defense have exempted their databases identified in Section I.A from these relevance and necessity requirements.[34]
- Agencies must grant individuals access to an accounting of when, why, and to whom their records have been disclosed. 5 U.S.C. § 552a(c)(3). The FBI and DHS have opted not to provide access rights for individuals who have information in the databases identified in Part 1.A.[35]
- Agencies must publish notice of the database that discloses the sources of records contained in the database. 5 U.S.C. § 552a(e)(4)(I). The FBI and DHS refuse to disclose the categories of sources of records contained in the FBI Data

---

[33] *See supra* note 32.

[34] *See supra* note 32.

[35] *See supra* note 32.

Warehouse,[36] Secure Flight,[37] ATS,[38] and AFI.[39]

The Privacy Act is intended to guard the privacy interests of citizens and lawful permanent residents against government intrusion. But the FBI and DHS have effectively circumvented the intent of the Privacy Act while amassing large collections of personal information about ordinary citizens without adequate accountability.

This development should be of particular concern to the Court in this matter because police access to inaccurate and incomplete records across the federal government will expand dramatically if the decision of the lower court is overturned. In a case concerning police use of government databases, a diminished Fourth Amendment standard coupled with a weakened Privacy Act is truly a recipe for a loss of liberty in America.

2. Government databases are notorious for containing inaccurate and out-of-date records.

Many of these government databases are notoriously inaccurate. The Boston Police Department recently revealed that an internal database is "riddled with errors" that have affected "thousands of entries." Jordan Graham, *Boston Police to Update Traffic Stop Database*, Gov't Tech. (Jan. 20,

---

[36] 28 C.F.R. § 16.96(v).

[37] 49 C.F.R. § 1507.3(k).

[38] 6 C.F.R. pt. 5, App. C 45.

[39] 6 C.F.R. pt. 5, App. C 69.

2016).[40] The FBI's NGI biometric database has an error rate "as high as 20 percent." Timothy Williams, *Facial Recognition Software Moves From Overseas Wars to Local Police*, N.Y. Times (Aug. 12, 2015).[41] And a 2012 report by U.S. Senate Committee on Homeland Security and Governmental Affairs found that "fusion centers often produced irrelevant, useless or inappropriate intelligence reporting to DHS, and many produced no intelligence reporting whatsoever." Staff of Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Governmental Affairs, 112th Cong., *Rep. on Federal Support for and Involvement in State and Local Fusion Centers* 2 (2012).[42]

FBI criminal records databases are also full of inaccuracies. All states provide arrest records to FBI databases such as NCIC and NGI.[43] But for the majority of states, less than 75 percent of these arrest records include final dispositions. U.S. Gov't

---

[40] http://www.govtech.com/public-safety/Boston-Police-to-Update-Traffic-Stop-Database.html.

[41] http://www.nytimes.com/2015/08/13/us/facial-recognition-software-moves-from-overseas-wars-to-local-police.html.

[42] *Available at* http://www.hsgac.senate.gov/download/?id=49139e81-1dd7-4788-a3bb-d6e7d97dde04.

[43] For example, the Interstate Identification Index is a "cooperative federal- state program for the interstate exchange of criminal history record information for the purpose of facilitating the interstate exchange of such information among criminal justice agencies." Privacy Act of 1974; Notice of Modified Systems of Records, 64 Fed. Reg. 52,343, 52,344 (Sept. 28, 1999).

Accountability Office, GAO-15-162, *Criminal History Records, Additional Actions Could Enhance the Completeness of Records Used for Employment-Related Background Checks* 19 (2015) [hereinafter "GAO Criminal History Records Report"].[44] A 2013 report revealed that "1.8 million workers a year are subject to FBI background checks that include faulty or incomplete information," and that "50 percent of the FBI's [criminal] records fail to include information on the final disposition of the case." Madeline Neighly & Maurice Emsellem, *Wanted: Accurate FBI Background Checks for Employment*, Nat'l Emp't Law Ctr. 1 (July 2013).[45]

Government agencies also rely on private sector companies to compile information about citizens. *See, e.g.*, Fusion Center Guidelines, *supra*, at 33; LexisNexis Special Services Inc., *What We Do* (2015)[46] (stating that LNSSI "delivers a comprehensive suite of solutions to arm government agencies with superior data, technology and analytics to support mission success"). But private sector databases are known to be erroneous. *See, e.g.*, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. argued Nov. 2, 2015) (concerning incorrect entries in a large public database containing profiles of consumers). The Government Accountability Office ("GAO") observed last year that "[p]rivate companies can face challenges in obtaining complete and accurate records, in part because not all states make their

---

[44] http://www.gao.gov/assets/670/668505.pdf.

[45] https://nelp.3cdn.net/bd23dee1b42cff073c_8im6va8d2.pdf.

[46] http://lexisnexisspecialservices.com/what-we-do/.

criminal record information accessible for private companies to search." GAO Criminal History Records Report, *supra*, at 37–38. In addition, the laws and regulations "that govern the gathering of information by the law enforcement establishment do not necessarily apply (or do not apply with clarity)" to private data aggregation companies, which amplifies the risk of inaccuracies. NRC *Engaging Privacy* Report, *supra*, at 275. Government use of private sector databases present the risk that law enforcement "will be able to avoid the restraints that have been placed on it to ensure the privacy of the individual citizen." *Id.*

"[M]isidentifications and erroneous watchlist entries" have also plagued the TSA and CBP databases. William J. Krouse, Cong. Research Serv., R42336, *Terrorist Watch List Screening and Background Checks for Firearms* 11 (2013).[47] For example, GAO reported in 2004 that the TSA's CAPPS II program faced "significant implementation challenges," in part because the TSA "has not yet determined the accuracy—or conversely, the error rate—of commercial and government databases that will be used by CAPPS II." GAO CAPPS Report, *supra*, at 14. Significant "false alerts" caused the TSA to abandon CAPPS II in favor of Secure Flight in 2004. TSA, *TSA to Test New Passenger Pre-Screening Program*, *supra*. The DHS then spent more than seven years attempting to resolve "inconsistencies" between the TSA's Secure Flight database and CBP's ATS database, which draw from the same FBI watchlists. *See* ATS PIA 2014, *supra*.

---

[47] https://www.fas.org/sgp/crs/terror/R42336.pdf.

The problems caused by erroneous and untimely data will only multiply as federal agencies look to increase interoperability without addressing accuracy. *See, e.g.*, *Interoperability Means Success for All Law Enforcement*, CJIS Link (FBI Washington, D.C.);[48] FBI, *Interoperability Initiatives Unit (IIU)*.[49] "[D]ata from different sources often arrives at different rates and with different data quality issues that can affect the ability to merge it together." Kalev Leetaru, *Policing Meets Big Data: A Lesson In Sentiment Mining, Data Recency And Dashboards*, Forbes (Jan. 17, 2016).[50] As huge data sets are shared between agencies at the federal, state, local, and tribal levels, inaccuracies will perpetuate and become harder to fully eliminate.

Because individuals do not have the ability to challenge erroneous entries in many of these databases, the consequences of incorrect entries go unchecked. For example, Jelani Henry spent two years in Riker's Island in pre-trial detention for a shooting he did not commit, including nine months in solitary confinement, before the charges were dismissed. Ben Popper, *How The NYPD Is Using*

---

[48] https://www.fbi.gov/about-us/cjis/cjis-link/may-2013/interoperability-means-success-for-all-law-enforcement (last visited Jan. 27, 2016).

[49] https://www.fbi.gov/about-us/cjis/fingerprints_biometrics/biometric-center-of-excellence/files/iiubro4smallest-508-compliant.pdf (last visited Jan. 27, 2016).

[50] http://www.forbes.com/sites/kalevleetaru/2016/01/17/policing-meets-big-data-a-lesson-in-sentiment-mining-data-recency-and-dashboards/#469b93fc4acb.

Social Media to Put Harlem Teens Behind Bars, Verge (Dec. 10, 2014);[51] Meredith Broussard, *When Cops Check Facebook*, Atlantic (Apr. 19, 2015).[52] Henry was arrested because he had "liked" gang photos on Facebook. Broussard, *supra*; Popper, *supra*. As a result, he had been labeled as a gang affiliate in a law enforcement database—even though he was not involved and had only "liked" the photos to avoid social problems in his neighborhood. Broussard, *supra*.

Only one person—Rahinah Ibrahim—has succeeded in removing her name from the TSA's "No Fly" list. *Ibrahim v. DHS*, 62 F. Supp. 3d 909, 929 (N.D. Cal. 2014); Raymond Bonner, *"No-Fly List" Riddled with Errors, Impossible to Get Off of*, Informed Comment (Dec. 16, 2015).[53] In order to correct the error, Ibrahim went through ten years of litigation, including three appeals, before a trial revealed that Ibrahim had been improperly placed on a watchlist. 62 F Supp. 3d at 929 ("Significantly, therefore, our case involves a conceded, proven, undeniable, and serious error by the government—not merely a risk of error."). Throughout the proceedings, the government steadfastly refused to confirm or deny any information about the list or their procedures. Bonner, *supra*.

---

[51] http://www.theverge.com/2014/12/10/7341077/nypd-harlem-crews-social-media-rikers-prison.

[52] http://www.theatlantic.com/politics/archive/2015/04/when-cops-check-facebook/390882/.

[53] http://www.juancole.com/2015/12/riddled-errors-impossible.html.

That so many databases containing sensitive personal information remain stricken with errors and inaccuracies cautions against relying on those databases to attenuate the taint of an unlawful police stop.

II. Overturning the decision below would permit suspicionless identification and defeat the protections established in *Hiibel* and *Terry*.

A. This Court has not permitted compelled identification absent reasonable articulable suspicion.

As this Court has previously held, officers can require individuals to identify themselves only during a stop based on reasonable suspicion. In *Hiibel v. Sixth Judicial Dist. Court of Nev., Humbolt Cty.*, this Court found constitutional a Nevada state law "requiring a suspect to disclose his name in the course of a valid *Terry* stop." 542 U.S. 177, 188 (2004). The Court noted first that "it is well established that an officer may ask a suspect to identify himself in the course of a *Terry* stop." *Id.* at 186. In condoning not just the ability to request identification but the ability to compel it with threat of criminal sanction, the Court concluded that the "request for identity has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop." *Id.* at 188.

In upholding an officer's ability to compel identification, however, the Court identified two critical limitations. First, the Nevada law only required Hiibel to "disclose his name." *Id.* at 185. The Court noted with approval that the statute did not require an individual to "give the officer a driver's

license or any other document," *id.*, or "'provide private details about his background,'" *id.* (quoting *Hiibel v. Sixth Judicial Dist.*, 59 P.3d 1201, 1206 (Nev. 2002) (opinion of Young, C.J.)). Second, compelled identification is permissible for the limited purposes of a *Terry* stop: An officer cannot compel identification "if the request for identification is not reasonably related to the circumstances justifying the stop." *Id.* at 188.

This Court has also recognized a number of important limitations on *Terry* stops. A *Terry* stop must not resemble a traditional arrest. *Dunaway v. New York*, 442 U.S. 200, 212 (1979). Instead, the scope of a *Terry* stop "must be carefully tailored to its underlying justification." *Florida v. Royer*, 460 U.S. 491, 500 (1983); *see Terry*, 392 U.S. at 19 (internal quotation marks omitted). A constitutionally reasonable *Terry* stop must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *United States v. Sharpe*, 470 U.S. 675, 682 (1985). A *Terry* stop must also "be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Royer*, 460 U.S. at, 500; *accord. United States v. Place*, 462 U.S. 696, 709–10 (1983).

During a *Terry* stop, the officer can also conduct a "reasonable search for weapons" only when the officer "has reason to believe that he is dealing with an armed and dangerous individual." *Terry*, 392 U.S. at 27. The "sole justification of the search" during a *Terry* stop "is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.*

at 29. *See also Riley v. California*, 134 S. Ct. 2473, 2477 (2014) (outlining a similar rationale for searches incident to arrest).

But providing an officer with identification is no longer limited to the merely disclosing "a name." *Hiibel*, 542 U.S. at 185. Government databases now provide police officers with access to the exact private background details and other documents that the Nevada statute was supposed to prevent. *See id.* Information in government databases now extends far beyond whether a "suspect is wanted for another offense, or has a record of violence or mental disorder." *Id.* at 186.

The results of running an individual's identification are also no longer "reasonably related to the circumstances justifying the stop." *Hiibel*, 542 U.S. at 188. This Court defines a *Terry* stop as a limited intrusion that must be "justified at its inception" and "reasonably related in scope to *the circumstances which justified the interference in the first place*." *Sharpe*, 470 U.S. at 682 (emphasis added). But given the scope of information contained in government databases, an identification check quickly becomes an examination of databases containing sensitive personal information about the individual, including her potential involvement in, or "risk" of, committing other crimes.

B. Admitting the evidence in this case would create an end-run around the reasonable suspicion standards in Hiibel *and* Terry.

The lower court in this case rejected the argument that evidence obtained during an unlawful stop would nevertheless be admissible because the

officer compelled identification and discovered an unrelated warrant. *State v. Strieff*, 357 P.3d 532, 536 (Utah 2015). This Court should affirm that ruling because enforcing the prohibition on suspicionless identification is the only way to ensure that the Fourth Amendment protections outlined in *Hiibel* and *Terry* are upheld. Overturning the opinion would permit the results of an identification search to provide a *post hoc* justification for an unlawful detention. This would essentially create an end-run around the reasonable suspicion standard and enable routine identification of individuals in order to obtain evidence that would justify further escalation of the encounter.

This Court has recognized that "questions concerning a suspect's identity are a routine and accepted part of many Terry stops," but only to the extent justified and based on reasonable suspicion. *Hiibel*, 542 U.S. at 186, 188. Many states have explicitly recognized this requirement, passing laws that permit officers to identify a suspect only when they have reasonable suspicion. The states that have explicitly recognized this limitation include:

- Alabama. Ala. Code § 15-5-30 (2015) (reasonable suspicion);
- Arizona. Ariz. Rev. Stat. Ann. §§ 13-2412, 28-1595 (2015) (reasonable suspicion);
- Arkansas. Ark. Code Ann. § 5–71–213(a)(1) (2015) (Class C misdemeanor (loitering) to "linger[], remain[], or prowl[]" in a public place without apparent reason and, upon inquiry from law enforcement, refuse to provide identity);

- Colorado. Colo. Rev. Stat. § 16-3-103 (2015) (reasonable suspicion);
- Delaware. Del. Code Ann. tit. 11, §§ 1902(a) ("reasonable grounds"), 1321(6) (loitering) (2016);
- Florida. Fla. Stat. §§ 901.151 ("reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of [Florida] or the criminal ordinances of any municipality or county"), 856.021(2) (loitering) (2015);
- Georgia. Ga. Code Ann. § 16–11–36(b) (2015) (failure to identify oneself may be considered factor in determining whether individual is loitering);
- Illinois. 725 Ill. Comp. Stat. 5/107–14 (2015) ("[R]easonably infers from the circumstances that the person is committing, is about to commit or has committed an offense.");
- Indiana. Ind. Code § 34-28-5-3.5 (2014) (Class C misdemeanor to refuse to provide identity to a law enforcement officer who has stopped the person for an infraction or ordinance violation);
- Kansas. Kan. Stat. Ann. § 22–2402(1) (2015) (reasonable suspicion);
- Louisiana. La. Code Crim. Proc. Ann. art. 215.1(A) (2015) (reasonable suspicion);
- Missouri. Mo. Rev. Stat. § 84.710(2) (2015) (reasonable suspicion (Kansas City only));
- Montana. Mont. Code Ann. § 46–5–401(2)(a) (2015) ("particularized suspicion");
- Nebraska. Neb. Rev. Stat. § 29–829 (2015) (reasonable suspicion);

- Nevada. Nev. Rev. Stat. § 171.123 (2015) (reasonable suspicion);
- New Hampshire. N.H. Rev. Stat. Ann. §§ 594:2, 644:6 (Lexis 2015) (reasonable suspicion);
- New Mexico. N.M. Stat. Ann. § 30–22–3 (2015) (concealing identity with intent to obstruct the due execution of the law or hinder or interrupt any public officer is a petty misdemeanor);
- New York. N.Y. Crim. Proc. Law § 140.50(1) (McKinney 2015) (reasonable suspicion);
- North Dakota. N.D. Cent. Code § 29–29–21 (2015) (reasonable suspicion);
- Ohio. Ohio Rev. Code Ann. § 2921.29 (LexisNexis 2015) (reasonable suspicion);
- Rhode Island. R.I. Gen. Laws § 12–7–1 (2015) (reasonable suspicion);
- Utah. Utah Code Ann. § 77–7–15 (2015) (reasonable suspicion);
- Vermont. Vt. Stat. Ann. tit. 24, § 1983 (2015) (law enforcement officer may detain a person for refusing to identify themselves when requested by officer); and
- Wisconsin. Wis. Stat. § 968.24 (2015) (reasonable suspicion).

Overturning the lower court's opinion would permit law enforcement to circumvent these restrictions and routinely compel identification in order to search for information that would justify a seizure or arrest. There is now so much information available about ordinary citizens in government databases that routine ID checks could very well lead to prolonged detention or examination. *See* Part I.A,

supra. But much of the information in law enforcement databases is inaccurate or misleading, and the government has chosen to exempt its systems from the accuracy and transparency obligations established in the Privacy Act. *See* Part I.B., *supra*.

Furthermore, it would be inequitable to allow the results of an unlawful stop and identification to retroactively justify the improper behavior of the officer. This Court recently held that where an officer stops an individual based on a mistake about the applicable law or facts, that reasonable mistake does not retroactively render the stop unlawful. *See Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014). But the government cannot have it both ways. If a reasonable mistake about the legal or factual predicate of a stop does not render that stop unlawful, then evidence discovered after an unlawful stop should not render the unlawfully seized evidence admissible. If data obtained during an identification search could retroactively change the lawfulness of a stop, then there would be a clear incentive to engage in suspicionless stops for identification purposes. Any ID check that linked an individual with data suggesting criminal intent would, in hindsight, justify the unlawful stop.

The widespread collection and dissemination of data about ordinary citizens requires even more vigilant protection of important Fourth Amendment interests. As Justice O'Connor recognized more than two decades ago:

> [T]he advent of powerful, computer-based recordkeeping systems [f]acilitate arrests in ways that have never before been possible. The police, of course, are entitled to enjoy the substantial

> **advantages this technology confers. They may not, however, rely on it blindly. With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities.**

Arizona v. Evans, 514 U.S. 1, 17–18 (1996) (O'Connor, J., concurring).

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to affirm the decision of the Supreme Court of Utah below.

Respectfully submitted,

MARC ROTENBERG
Counsel of Record
ALAN BUTLER
CAITRIONA FITZGERALD
CLAIRE GARTLAND
AIMEE THOMSON
ELECTRONIC PRIVACY
INFORMATION CENTER (EPIC
1718 Connecticut Ave. N.W
Suite 200
Washington, DC 20009
(202) 483-1140
rotenberg@epic.org

January 29, 2016

No. 14-1373

In The Supreme Court of the United States

STATE OF UTAH, PETITIONER,

v.

EDWARD JOSEPH STRIEFF, JR., RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

BRIEF OF SOUTHWESTERN LAW STUDENT TRACY E. LABRUSCIANO, AND PROFESSORS NORMAN M. GARLAND AND MICHAEL M. EPSTEIN, IN ASSOCIATION WITH THE AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL, AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

NORMAN M. GARLAND
Counsel of Record
MICHAEL M. EPSTEIN
AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL
3050 WILSHIRE BLVD.
LOS ANGELES, CA 90010
(213) 738-6774
amicusproject@swlaw.edu

QUESTION PRESENTED

Whether the evidence seized from respondent incident to his arrest on a minor traffic warrant discovered during an unconstitutional detention is inadmissible under the "attenuation" exception to the exclusionary rule.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THE EXCLUSIONARY RULE SHOULD APPLY IN THIS CASE 3

A. The Threshold Inquiry For Exclusionary Rule Analysis Asks Whether Exclusion Of The Evidence Serves Individual Freedom From Unreasonable Seizure And Detention Proscribed By The Fourth Amendment 4

B. The Proper Attenuation Inquiry Is Whether The Evidence Has Been Sufficiently Purged Of The Taint Of Government Misconduct 9

1. The Three Factor Attenuation Test Adopted By This Court Should Be Clarified With Regard To Suppression Of Physical Evidence 10

2. All Three Factors Must Be Considered In Their Totality, With Due Regard

Given To The Type Of Evidence At Issue 12

II. THE DETERRENCE BENEFITS OF EXCLUSION SIGNIFICANTLY OUTWEIGH THE MINIMAL COST TO SOCIETY 17

A. Lower Courts Have Demonstrated That Exclusion Is The Only Viable Remedy When There Are No Independent Intervening Circumstances.....18

B. Where An Objectively Reasonable Belief That An Officer's Conduct Was Lawful Does Not Exist, Deterrence Is The Only Appropriate Solution.....22

C. Where The Sole Evidence Of A Previously Uncharged Crime Is A Direct Result Of Police Misconduct, The Cost Of Exclusion Is Negligible.....27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Arizona v. Evans, 514 U.S. 1 (1995) 25

Arizona v. Gant, 556 U.S. 332 (2009) 22, 23

Brown v. Illinois, 422 U.S. 590 (1975) .....*passim*

Chimel v. California, 395 U.S. 752 (1969).....22

Delaware v. Prouse, 440 U.S. 648 (1979).....26

Gordon v. United States,
120 A.3d 73 (D.C. 2015) 19

Heien v. North Carolina,
135 S. Ct. 530 (2014) 4

Herring v. United States,
555 U.S. 135 (2009) 15, 17, 22

Hudson v. Michigan, 547 U.S. 586 (2006).....*passim*

I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984) 5

Mapp v. Ohio, 367 U.S. 643 (1961) 3

Murray v. United States, 487 U.S. 533 (1988) 6

Nardone v. United States, 308 U.S. 338 (1939) 9

Nix v. Williams, 467 U.S. 431 (1984) 6

Pennsylvania Bd. of Probation and Parole v. Scott,
524 U.S. 357 (1998) 5

People v. Mitchell, 824 N.E.2d 642
(Ill. App. Ct. 2005) 20

Rakas v. Illinois,
439 U.S. 128 (1978) 5

Salt Lake City v. Ray,
98 P.2d 274 (Utah App. 2000).....26

State v. Bailey, 338 P.3d 702 (Or. 2014).....19

State v. Hummons, 253 P.3d 275 (Ariz. 2011) 13

State v. Jones, 17 P.3d 359 (Kan. 2001) 18, 21

State v. Markland, 112 P.3d 507 (Utah 2005).....26

State v. Martin, 179 P.3d 457 (Kan. 2008)
cert. denied, 555 U.S. 880 (2008) 18, 19

State v. Moralez,
300 P.3d 1090 (Kan. 2013) .....*passim*

State v. Moralez, 242 P.3d 223 (Kan. Ct. App. 2010)
(Atcheson, J., dissenting) 28

State v. Shaw, 64 A.3d 499 (N.J. 2012) 20, 21

State v. Williams,
926 A.2d 340 (N.J. 2007) 20, 21

Stone v. Powell, 428 U.S. 465 (1976) 5

Terry v. Ohio, 392 U.S. 1 (1968) 26

United States v. Ceccolini, 435 U.S. 268 (1978) 11

United States v. Hector, 474 F.3d 1150 (9th Cir.), *cert. denied*, 552 U.S. 1104 (2008) 8

United States v. Leon, 468 U.S. 897 (1984) .....*passim*

United States v. Robinson, 414 U.S. 218 (1973) 22

Walder v. United States, 347 U.S. 62 (1954) 5

Weeks v. United States, 232 U.S. 383 (1914) 3

Wong Sun v. United States, 371 U.S. 471 (1963) 7, 9

STATUTES

Utah. Code Ann. § 77-7-15 (1999).....26

OTHER AUTHORITIES

Development in the Law – Policing, 128 Harv. L. Rev. 1723, 1724 (2015) 25

Myron W. Orfield, Jr., Comment, The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers, 54 U. Chi. L. Rev. 1016 (1986).....23

INTEREST OF THE AMICI CURIAE[1]

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Respondent. Norman M. Garland is a professor of law at Southwestern Law School. He teaches Evidence and Constitutional Criminal Procedure and has authored numerous publications on both Evidence and Criminal Law. Michael M. Epstein is a professor of law and the Director of the pro bono Amicus Project at Southwestern Law School. Amicus Tracy E. Labrusciano is an upper-division J.D. candidate at Southwestern Law School with extensive academic and professional interest in Criminal Law.

Amici have neither interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in the Court's interpretation of the Exclusionary Rule.

---

[1] All parties have received timely notice and have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Southwestern Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amici curiae*.) Otherwise, no person or entity other than the *amici curiae* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

If the Fourth Amendment right of the people to be secure in their persons is not to be reduced to a mere form of words, then the exclusionary rule must apply in this case. Suppression of evidence is the appropriate remedy when no exclusionary rule exception exists to render the evidence admissible. The attenuation exception cannot apply in this case. No other exception is applicable either.

Three reasons support the conclusion that the attenuation exception does not apply in this case. First, exclusion of the physical fruit of a Fourth Amendment violation protects citizens from the unreasonable searches and seizures proscribed by the Constitution and feared by its Framers. Second, proper application of this Court's three-pronged attenuation test squarely favors suppression. Third, application of the exclusionary rule in this case would strongly deter law enforcement misuse of ubiquitous outstanding warrant databases to violate citizens' privacy rights in the manner of the general warrants so condemned by the Framers.

The attenuation exception need not be limited to independent acts of a defendant's free will, as the Utah Supreme Court found in this case. Rather, this exclusionary rule exception may be applied to unlawfully seized inanimate objects provided either of two situations exists: the constitutional guarantee implicated would not be served by suppression, or, in considering the totality of the circumstances, the taint of the constitutional violation has been sufficiently

purged from the contested evidence. Neither of those situations exists in this case; hence, the attenuation exception should not apply and the illegally seized evidence should be excluded as the court below held.

ARGUMENT

I. THE EXCLUSIONARY RULE SHOULD APPLY IN THIS CASE.

Detective Fackrell had no legal basis for initially stopping and detaining Mr. Strieff. The physical evidence discovered was thus the byproduct of Detective Fackrell's violation of Mr. Strieff's basic Fourth Amendment rights. Accordingly, that evidence should have been suppressed by the trial court. Detective Fackrell had no justification under the law for seizing and detaining Mr. Strieff. No search or arrest warrant existed. No probable cause existed. No reasonable suspicion existed. Detective Fackrell's seizure of Mr. Strieff lacked an objectively reasonable basis, and the initial seizure itself was a clear Fourth Amendment violation, as conceded by the State of Utah.

The Fourth Amendment exclusionary rule, while an extreme remedy, has significantly evolved since its inception. See *Weeks v. United States*, 232 U.S. 383, 292 (1914) (announcing the exclusionary rule as a remedy for Fourth Amendment violations); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (applying the exclusionary rule to the states). Recently, This Court stated that exclusion "has always been our last resort, not our first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). Justice Kennedy's concurrence in

Hudson, however, pointed out that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt." *Id.* at 603 (Kennedy, J., concurring). This Court has established numerous exceptions to the exclusionary rule. Yet, the vitality of the exclusionary rule has been continually recognized in situations where the exceptions are inapplicable. This case, involving an egregious violation of Mr. Strieff's rights, presents a classic situation for application of the exclusionary rule because no exceptions apply.

A. The Threshold Inquiry For Exclusionary Rule Analysis Asks Whether Exclusion Of The Evidence Serves Individual Freedom From Unreasonable Seizure And Detention Proscribed By The Fourth Amendment.

Writing for the majority in *Hudson*, Justice Scalia made clear that "but-for causality is only a necessary, not a sufficient, condition for suppression." *Hudson*, 547 U.S. at 592. In dictum, Justice Scalia seemed to provide a new qualification for attenuation, remarking that it "also occurs when even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Id.* at 593. This Court has often stated that the "ultimate touchstone of the Fourth Amendment is reasonableness." *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) (quoting *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). Accordingly, the Court's jurisprudence has established clear guidelines for determining what is "reasonable" law enforcement conduct in safeguarding Fourth Amendment rights.

The initial inquiry when deciding the application of the exclusionary rule necessarily is whether the party seeking suppression has "standing" to do so. The correct analysis "forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment." *Rakas v. Illinois*, 439 U.S. 128, 139 (1978). A further requirement that the interest protected by the violated constitutional guarantee would be served by suppression would reasonably be a second threshold inquiry.

Fourth Amendment precedent has further limited the exclusionary rule's contextual use to criminal trials. See, e.g., *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 359 (1998) (exclusionary rule not applied in parole revocation hearings); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1051 (1984) (exclusion of reliable evidence not subject to suppression in civil deportation proceeding where Fourth Amendment violation was not egregious); *Stone v. Powell*, 428 U.S. 465, 481-82 (1976) (exclusionary rule not extended to federal habeas corpus proceedings where defendant had full and fair opportunity to litigate Fourth Amendment claim at trial). Even within the criminal trial context, the exclusionary rule does not bar introduction of tainted evidence to impeach a defendant's own testimony. *Walder v. United States*, 347 U.S. 62, 65 (1954). Each of the foregoing limitations are reasonable because the interest against unlawful search and seizure would not be vindicated by suppression; in each instance, additional evidence exists against the defendant such that only marginal deterrence would result from exclusion.

Within a criminal trial, evidence will not be subject to suppression if its inclusion is objectively reasonable. The "good faith" exception is now well-settled, permitting "the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment. *United States v. Leon*, 468 U.S. 897, 909 (1984) (quoting *Illinois v. Gates*, 462 U.S. at 255 (White, J., concurring in judgment)). When considering why additional exceptions to the exclusionary rule allow tainted evidence to be used during a criminal trial, this Court has discussed whether the interest protected by the constitutional guarantee violated would be served by suppression.

The "independent source" doctrine provides for admission of "evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality." *Murray v. United States*, 487 U.S. 533, 537 (1988). If no connection exists, then any search and seizure is plainly reasonable under the Fourth Amendment. On the other hand, when illegal government activity is involved, evidence is only admissible if inevitably discovered or attenuated from the initial illegality. Inevitable discovery allows for introduction of tainted evidence if it "ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams*, 467 U.S. 431, 444 (1984). In such an instance, the evidence is considered untainted, thus its introduction is reasonable. When an attenuated connection exists, the contested evidence is discovered "by means sufficiently distinguishable to be purged of the primary taint."

Wong Sun v. United States, 371 U.S. 471, 488 (1963), quoting Maguire, Evidence of Guilt, 221 (1959). Admission of evidence when its causal link to illegal government conduct is remote is therefore reasonable under the Fourth Amendment. In these instances, the protected Fourth Amendment interest would not be served by suppression of evidence.

Hudson inquired whether a violation of the knock-and-announce rule required suppression of evidence seized inside a home pursuant to a valid search warrant. *Hudson* at 593. This Court characterized the interests protected by the knock-and-announce rule as "human life and limb," "property," and "privacy and dignity of the sort that can be interrupted by a sudden entrance." *Id.* Because a valid search warrant existed in *Hudson*, the privacy interest in one's home mandated by the Fourth Amendment was protected by the existence of the warrant. Accordingly, in *Hudson*, the citizen's basic privacy rights were not violated by the knock-and-announce violation.

Thus, *Hudson* established a second threshold inquiry required before the exclusionary rule can be applied, in addition to the "standing" inquiry. Recognizing this second threshold inquiry would save courts time in deciding whether evidence should be suppressed because there would be no need to delve into a nuanced analysis of any exclusionary rule if it is not met. The Ninth Circuit has applied this inquiry in deciding whether a defendant, not presented with a copy of a valid search warrant for his home, was entitled to suppression of evidence seized therein. *United States v. Hector*, 474 F.3d 1150, 1151-52 (9th

Cir. 2008), *cert. denied*, 552 U.S. 1104 (2008). The court ruled in favor of suppression, proclaiming: "Without deciding whether the failure to provide a copy of the warrant was a constitutional violation, we conclude that even if it were, it was not a 'but-for cause' of seizure of the evidence." *Id.* Further analysis utilized the proposed second threshold inquiry; the court reasoned that "[r]egardless of whether police officers had actually shown [the defendant] the search warrant, they would have executed it and recovered the drugs and firearms inside his apartment. *Id.*

Applying the same rationale to the instant case, the Fourth Amendment right of the people "to be secure in their persons...against unreasonable searches and seizures..." would plainly be served by suppression of the evidence against Mr. Strieff. Detective Fackrell testified that he stopped and detained Strieff because he "was coming out of the house that I had been watching and I decided that I'd like to ask somebody if I could find out what was going on [in] the house." J.A. at 17. After following Strieff as he walked to a nearby convenience store, Fackrell stopped and detained him with no legal basis and subsequently "had dispatch run a warrants check, normal warrants check" while retaining Strieff's identification card. J.A. at 18.

This case is unlike *Hudson* because Detective Fackrell's illegal stop and detention of Mr. Strieff, violating his right to be let alone, directly led to the evidence sought to be suppressed. Fackrell detained Mr. Strieff by retaining his identification card for the purpose of conducting a warrant check; the discovery of physical evidence flowed directly and immediately

from those actions. The execution of the arrest warrant and search of Mr. Strieff were not mere but-for results of the illegal stop and detention. Hence, Mr. Strieff's basic privacy interests, to be let alone and go on his way, were trampled by Detective Fackrell's random stop and detention. The proposed second threshold question for suppression is thus met in this case.

B. The Proper Attenuation Inquiry Is Whether The Evidence Has Been Sufficiently Purged Of The Taint Of Government Misconduct.

When the connection between a Fourth Amendment violation and derivatively acquired evidence has become so strained as to "dissipate the taint" of the initial illegality, attenuation occurs. *Nardone v. United States*, 308 U.S. 338, 341 (1939). Determination of whether the disputed evidence remains "fruit of the poisonous tree" or has become attenuated turns upon whether the evidence was obtained through "exploitation of the illegality" or "instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

The proper attenuation inquiry, then, is whether the evidence has been discovered by "exploitation of" an illegal stop and detention or other Fourth Amendment violation, or by means "sufficiently distinguishable" from the official misconduct to be constitutionally acceptable. Unless the means employed to acquire physical evidence can be meaningfully separated from the unconstitutional violation, the interest protected

by the Fourth Amendment guarantee to be free from "unreasonable searches and seizures" will be served by exclusion of the evidence. Without a doubt the search of Mr. Strieff immediately followed the unlawful stop and detention that led to discovery of an outstanding minor traffic warrant. Detective Fackrell exploited the illegality of the unjustified stop and detention in order to search the outstanding warrant database. Nothing of the order of any factors this Court has found to attenuate intervened. There was no attenuating circumstance present in this case.

1. The Three Factor Attenuation Test Adopted By This Court Should Be Clarified With Regard To Suppression Of Physical Evidence.

This Court has rejected a "but-for" test in determining the application of the attenuation exception. Instead the Court has weighed and applied three relevant factors: the "temporal proximity" of illegal government conduct and the discovery of evidence, the presence or absence of "intervening circumstances", and the "purpose and flagrancy" of the official misconduct. *Brown v. Illinois*, 422 U.S. 590 (1975). No one factor is alone dispositive; analysis requires weighing the factors in light of the totality of the circumstances. *Id.* Practical application of the *Brown* factors to an outstanding arrest warrant scenario has proven controversial, causing disagreement among lower courts.[2] However,

---

[2] *See* Petition for Writ of Certiorari, *Strieff*, (2015) (No. 14-1373), categorizing three distinct approaches followed by the lower courts – (i.) courts applying *Brown* but treating the temporal proximity factor as irrelevant, instead primarily relying on the

applying the *Brown* factors in their totality, while considering their application to the discovery of physical evidence, should produce an answer: a rule that physical evidence discovered by exploitation of the illegality is not readily subject to attenuation without, at the very least, a meaningful "intervening circumstance." Further, discovery of the existence of an outstanding warrant by exploitation of the illegal stop and detention alone must not be treated as an intervening circumstance.

The *Brown* analysis is a true totality of the circumstances test rather than one whose factors may be individually disregarded depending on the situation. Moreover, the presence or absence of an intervening circumstance should carry stronger weight in an outstanding warrant scenario because it aids in determining whether the constitutional guarantee protected would be vindicated by suppression.

This Court has drawn a distinction between physical and verbal evidence for exclusionary rule purposes. In *Ceccolini* the Court held "the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object." *United States v. Ceccolini*, 435 U.S. 268, 280 (1978). Thus, as

---

flagrancy of the officer; (ii) courts seeming to always exclude evidence, which Petitioner contends places too much emphasis on the "temporal proximity" factor; (iii) courts never suppressing evidence, effectively creating a *per se* rule without analyzing *Brown*'s attenuation factors.

a preliminary matter in determining but-for causality, the discovery of physical evidence should be treated as separate and distinct from independent acts of an individual's free will. Moreover, a bright-line application of the exclusionary rule to "inanimate objects" in the attenuation context, absent an intervening overt act by the suspect, is appropriate.

2. All Three Factors Must Be Considered In Their Totality, With Due Regar Given To The Type Of Evidence At Issue.

If the *Brown* factors are to be weighed in their totality, no single factor should be discarded as inapplicable. Applying those factors to this case plainly leads to the conclusion that the sole evidence against Mr. Strieff is not attenuated from Detective Fackrell's misconduct.

The Kansas Supreme Court's recent decision in *State v. Moralez*, 300 P.3d 1090 (Kan. 2013) dealt with a case strikingly similar to Mr. Strieff's. In *Moralez*, a voluntary encounter between two officers and the defendant began while the officers were investigating potential criminal activity at an apartment complex in Topeka; the defendant was not a suspect at the time. *Id.* At some point during the encounter, one of the officers obtained Mr. Moralez's identification card in order to document his identity, and continued to retain his identification while running a warrant check. *Id.* After concluding that Mr. Moralez was seized within the meaning of the Fourth Amendment when the officer checked for outstanding warrants while retaining the defendant's identification card,

the court determined the seizure was unlawful because of the lack of individualized reasonable suspicion. *Id.* The decision in the case turned on whether discovering the warrant attenuated the taint of the illegal detention so that marijuana discovered in a search incident to Mr. Moralez's lawful arrest on the warrant should not be suppressed. *Id.* The *Moralez* court properly applied the *Brown* three-factor analysis to physical evidence according to the totality of the circumstances of the case and held that the physical evidence should have been suppressed.[3]

The "temporal proximity" factor refers to the time elapsed between the initiation of unlawful police conduct and the discovery of incriminating evidence. In *Brown*, this analysis turned upon the amount of time between Richard Brown's unlawful arrest and his subsequent confessions. In this case, the temporal proximity should be measured by the lapse of time between Detective Fackrell's misconduct in stopping and detaining Mr. Strieff and the discovery of physical evidence pursuant to a search incident to lawful arrest on a minor outstanding traffic warrant. Where a warrant is discovered nearly concurrent with the misconduct, unlike the matter of hours that elapsed

---

[3] Cf. *State v. Hummons*, 253 P.3d 275, 278 (Ariz. 2011), concluding the physical fruit of a Fourth Amendment violation was admissible while noting "if the purpose of an illegal stop or seizure is to discover a warrant – in essence, to discover an intervening circumstance – the fact that a warrant is actually discovered cannot validate admission of the evidence that is the fruit of the illegality." The Arizona court went on to emphasize the "purpose and flagrancy" factor without giving due weight to the absence of an intervening circumstance, and additionally characterizing the temporal proximity factor as "the least important." *Id.* at 277-279.

in *Brown*, this factor squarely weighs in favor of suppression but is unlikely alone to be determinative of the outcome.

The presence or absence of an "intervening circumstance" when physical evidence is discovered should be viewed in light of whether the circumstance may meaningfully break the chain of causation stemming from an officer's misconduct. When the concurrent and direct result of the officer's misconduct is the discovery of an outstanding warrant, leading to the nearly immediate acquisition of disputed evidence, an additional independent occurrence must be present in order to be considered "intervening." The absence of any such meaningful intervening occurrence weighs very strongly in favor of suppression.

A meaningful intervening circumstance, such as an attempt by the individual to flee, may break the chain of causation so that suppression of subsequently discovered physical evidence would no longer protect that individual's violated Fourth Amendment rights. In this case, Detective Fackrell testified that nothing gave him suspicion that Mr. Strieff was committing a crime other than leaving a home that was under surveillance. J.A. at 21. Detective Fackrell testified that he had never before seen Mr. Strieff; he had no idea whether Mr. Strieff was a resident of the home he was seen leaving, nor did he know how long he had been there. J.A. at 21. Detective Fackrell then followed Mr. Strieff as he walked a few short blocks to a 7-Eleven before stopping and detaining him, during which time Mr. Strieff did not commit any act to arouse the Detective's suspicion. J.A. at 21. Thus,

when Detective Fackrell ran a warrant check on Mr. Strieff without any suspicion of criminal activity and subsequently discovered a minor traffic warrant, no meaningful intervening event occurred to break the causal connection between the conceded illegal detention and the ensuing search.

Consideration of the "purpose and flagrancy" of official misconduct has been inconsistently applied in lower courts with regard to outstanding warrants and its proper analysis should be clarified by this Court. This case presents an opportunity for the Court to do so. "Purpose and flagrancy" may require consideration of the objective reason for the violation, or the degree to which the officer reasonably should have known his or her conduct was in violation of an individual's rights. What may be most appropriate for cases involving physical evidence is inquiry into whether the officer's purpose was with the hope that such evidence could be discovered. This Court's opinion in *Herring* emphasizes the importance of the "purpose and flagrancy" factor: "suppression of evidence is only appropriate where it will serve to deter flagrant, intentional police misconduct." *Herring v. United States*, 555 U.S. 135, 147-48 (2009). The Kansas Supreme Court's articulation of the "flagrancy" factor of attenuation as applied to an outstanding warrant circumstance in the *Moralez* case aids in clarifying the point: "Regardless of whether a suspicionless detention to identify a citizen and check that citizen for outstanding arrest warrants is characterized as a standard practice, a field interview, a pedestrian check, or a 'fishing expedition,' such a detention can, and often will, demonstrate at least some level of flagrant police conduct." *Moralez*, 300 P.3d at 1103.

The illegal conduct, then, must include a reasonable, objective purpose, aside from effecting a Fourth Amendment violation, in order to weigh in favor of attenuation. Where an investigatory stop is an unlawful seizure because it lacked any individualized suspicion, some other purpose must be served by the illegality if the resulting evidence is to be purged of the taint; one such example is an exigent circumstance. In the detention of a pedestrian, protection of the public in the wake of disaster would be such a distinct purpose; in the context of a vehicle stop, highway safety has consistently been recognized as this type of legitimate, separate purpose. There is nothing in the record to suggest that in this case, Detective Fackrell had any other objective reason for violating Mr. Strieff's Fourth Amendment rights than to check for warrants, or hope that he would discover something incriminating, without the required individualized suspicion. Therefore, the "purpose and flagrancy" factor of the *Brown* analysis also weighs in favor of suppression. In short, it is hardly likely that an 18-year veteran officer of the law, one who has attained the rank of detective, could objectively mistakenly believe that his action in randomly stopping and detaining a citizen with no individualized suspicion was not a violation of the Fourth Amendment. That is a flagrant Fourth Amendment violation.

Proper application of the *Brown* factors compels the conclusion that attenuation should not be found in this case. The temporal proximity of Detective Fackrell's misconduct and the seizure of the contested evidence was immediate. There was no meaningful

intervening circumstance between the initial illegal seizure and detention of Mr. Strieff and the discovery of the contested evidence. Even if this Court treats the discovery of an outstanding warrant as an intervening circumstance, the purpose and flagrancy of Detective Fackrell's misconduct weighs heavily in favor of suppression.

II. THE DETERRENCE BENEFITS OF EXCLUSION SIGNIFICANTLY OUTWEIGH THE MINIMAL COST TO SOCIETY

Suppression is not a necessary consequence of a Fourth Amendment violation, but may apply where it results in meaningful deterrence outweighing the substantial cost to society of excluding relevant, probative evidence. "The principal cost of applying the [exclusionary] rule is, of course, letting guilty and possibly dangerous defendants go free—something that 'offends the basic concepts of the criminal justice system.'" *Herring*, 555 U.S. at 141, quoting *Leon*, 468 U.S. at 908. The exclusion of relevant incriminating evidence necessarily entails that adverse consequence. But where the loss of physical evidence – the derivative, unattenuated fruit of officer misconduct – would lead to no basis for a case against the defendant, the privacy and freedom the Fourth Amendment aims to protect must be respected. In this case, that balancing favors exclusion.

A. Lower Courts Have Demonstrated That Exclusion Is The Only Viable Remedy When There Are No Independent Intervening Circumstances.

The Kansas Supreme Court found it necessary to hear and decide *Moralez* based largely on the undesirable effects from two of its previous decisions regarding the effect of discovery of an outstanding warrant during an unlawful detention. *See State v. Martin*, 179 P.3d 457 (Kan. 2008), *cert. denied*, 555 U.S. 880 (2008) and *State v. Jones*, 17. P.3d 359 (Kan. 2001). In *Jones*, the court held the outstanding warrant was sufficient to purge the taint of the unlawful detention because there was "no evidence of bad faith" on the part of the officer and the search occurred incident to a lawful warrant arrest. *Jones* at 361. In *Martin*, the court noted the "minimal nature and extent of the official misconduct" despite the officer requesting identification to run a warrant check because nothing suggested "that the officers' ultimate goal in making contact with Martin...was to search his person for drugs." 179 P.3d at 463. The court characterized the warrant as an intervening circumstance attenuating the taint of the unlawful detention, and thereby not suppressing physical evidence discovered in a search incident to arrest. *Id.* at 464. Acknowledging the unintentional consequences of these decisions, the Kansas court in *Moralez* expressly disapproved of interpreting either *Martin* or *Jones* to suggest an outstanding arrest warrant always attenuates the taint of an unlawful detention. *Moralez* at 1102.

The Kansas court summarized the effects of its decisions in *Martin* and when stating its reasoning in *Moralez*:

> Were it otherwise, law enforcement officers could randomly stop and detain citizens, request identification, and run warrants checks despite the lack of any reasonable suspicion to support the detention, knowing that if the detention leads to discovery of an outstanding arrest warrant, any evidence discovered in the subsequent search will be admissible against the defendant in a criminal proceeding unrelated to the lawful arrest.

Moralez, 300 P.3d at 1102.

Several other jurisdictions have emphasized the deterrent value of exclusion in similar situations, where a search incident to arrest on an outstanding warrant is preceded by an initial Fourth Amendment violation. *See, e.g.*, *State v. Bailey*, 338 P.3d 702, 711-715 (Or. 2014) (en banc) (finding error in the circuit court's denial of suppression where the officers "purposefully" unlawfully detained the defendant in his vehicle, absent any actual or implied knowledge justifying defendant's detention prior to the discovery of an arrest warrant.); *Gordon v. United States*, 120 A.3d 73, 86 (D.C. 2015) (holding both the defendant's statements to police and tangible evidence must be suppressed, and emphasizing in the *Brown* analysis that the officer's purpose at the time he initially seized defendant was to "utilize computer databases that

include information about warrant status."); *People v. Mitchell*, 824 N.E.2d 642, 650 (Ill. App. Ct. 2005) (noting that suppression "appears to be the only way to deter the police from randomly stopping citizens for the purpose of running warrant checks.")

The New Jersey Supreme Court has clearly delineated similar circumstances where attenuation may apply because appreciable deterrence will result. In *State v. Williams*, 926 A.2d 340, 342-43 (N.J. 2007), officers attempted to conduct an investigatory stop of an individual based upon a vague dispatch description of a "black man wearing a black jacket" possibly selling drugs at a particular residence. When the officers approached a "suspect" matching the description, he pushed one of the officers and fled; when the suspect was subsequently apprehended the search incident to arrest produced a handgun. *Id.* at 343. Despite the New Jersey Supreme Court's finding that the dispatch report did not give rise to reasonable suspicion of this individual, the suspect's actions amounted to obstruction. *Id.* at 342. His resistance and flight provided a meaningful "intervening circumstance" breaking the chain of causation of the unlawful detention – accordingly, attenuation was found. *Id.* at 345-346. In this instance, deterrence would clearly not result from suppression because the officers were attempting to reasonably respond to an escalating situation.

Contrasting *Williams* with *State v. Shaw*, 64 A.3d 499, 513 (N.J. 2012) provides insight as to how attenuation will not be found when appreciable deterrence would result. In *Shaw*, several officers, as part of a task force, were attempting to execute an

arrest warrant on one particular resident of a public housing complex. *Id.* at 501-502. The officers stopped a "suspect" but the only characteristics this man shared with the wanted fugitive were his race and gender. *Id.* Despite the suspicionless stop, the suspect's name was checked against a list from another task force at the same public housing unit naming persons wanted on parole warrants. *Id.* at 502. When a parole warrant was discovered, he was subsequently searched and physical fruits were found on his person. *Id.* After concluding that the defendant was the subject of an impermissible investigatory detention in violation of the Fourth Amendment, the court remarked: "There is a difference between an unlawful motor vehicle or investigatory stop in which, incidental to the stop, the police learn about an outstanding warrant and, as here, an unlawful stop executed for the *specific purpose* of ascertaining whether a suspect is the subject of an arrest warrant." *Id.* at 511 (emphasis added). In granting the defendant's motion to suppress in *Shaw*, the New Jersey Supreme Court cited its contrary finding in *Williams*, reasoning: "Suppressing evidence sends the strongest possible message that constitutional misconduct will not be tolerated and therefore is intended to encourage fidelity to the law." *Williams*, 926 A.2d at 340.

Even when finding attenuation in certain circumstances, the courts routinely dealing with cases such as Mr. Strieff's have been clear that deterrence is necessary to prevent widespread misconduct.

B. Where An Objectively Reasonable Belief That An Officer's Conduct Was Lawful Does Not Exist, Deterrence Is The Only Appropriate Solution.

The exclusionary rule solely exists to deter official misconduct that is "deliberate, reckless, or grossly negligent...or in some circumstances recurring or systemic negligence." *Herring v. United States*, 555 U.S. 135, 144 (2009). Deterrence analysis requires an objective inquiry into "whether a reasonably well trained officer would have known" that the seizure was illegal in light of "all of the circumstances." *United States v. Leon*, 468 U.S. 897, 922 (1987). When law enforcement activity is not found to be reasonable under the circumstances, the taint must be sufficiently purged in order to avoid exclusion of derivative evidence.

As noted by this Court in *Hudson*, "the value of deterrence depends upon the strength of the incentive to commit the forbidden act." *Hudson*, 547 U.S. at 596. Strength of incentive is high when an officer is rewarded with probative, relevant evidence while evading proper investigatory procedures. Mr. Strieff's arrest pursuant to the "minor traffic warrant" is not contested. Neither is a properly conducted search incident to lawful arrest. With regard to the search incident exception, *United States v. Robinson*, 414 U.S. 218, 235-36 (1973) is still binding precedent. But the principles behind the search incident exception, grounded in *Chimel v. California*, 395 U.S. 752, 764 (1969), are alive and well.[4] Where a police officer

[4] Justifications for search incident to arrest are officer safety and preventing destruction of evidence. *See Arizona v. Gant*, 556

conducts a warrant check, it is foreseeable that a warrant may be discovered. If the exclusionary rule were not applied in this instance, and a person illegally detained had an outstanding warrant for an unpaid parking ticket, failure to appear, or, like Mr. Strieff, a minor traffic violation, the Fourth Amendment violation would become irrelevant because any evidence seized upon arrest would be purged of the taint of the initial illegality. Moreover, in each of the aforementioned instances, no evidence of the crime of arrest would be discovered by a search. Unless *Robinson* were to be amended in a similar manner to *Gant*, inasmuch as an officer may only conduct a limited pat-down for weapons or search for evidence of the crime of arrest within the arrestee's immediate control, the only viable deterrence mechanism is suppression.

While he was a law student, Myron Orfield, currently the Director of the Institute on Metropolitan Opportunity at the University of Minnesota Law School, performed an empirical study of Chicago Narcotics officers examining the deterrent effects of successful suppression motions. Myron Orfield, Jr., Comment, The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers, 54 U. Chi. L. Rev. 1016, 1017-18 (1986). He chose the Narcotics Section because of frequent motions to suppress and the percentage of cases lost due to suppression was statistically more significant than with other crimes. *Id.* at 1024-1025. One of his

---

U.S. 332, 335 (2009) (holding that the search incident to arrest exception in vehicle searches is limited to a pat-down for weapons; a vehicle may only be re-entered for evidence of the crime of arrest.)

findings was that due to the exclusionary rule's power in the 1960s and 1970s, the local departments began to introduce institutional reforms, including an officer rating system by which the officers were insured that "suppressions negatively affected [the] officer's ability to retain her assignments and, to a lesser extent, to obtain promotions." *Id.* at 1027-1028. Supervisors in the Narcotics Section implemented procedural reforms designed to educate officers, but Orfield's survey demonstrated that the individual officers believed "the lessons of training did not firmly take hold until the officers faced real-life situations in the courtroom." *Id.* at 1037. Sixty-one percent of the responding officers believed they learned about Fourth Amendment legal requirements "very frequently" or "every time" evidence was suppressed. *Id.* Moreover, the reaction these officers had to their peers having evidence suppressed indicated "that an officer's pattern of suppression would engender a reputation for laziness, incompetence, or dishonesty." *Id.* at 1048. Thus, institutional reforms based upon the response to suppression were commonly effective at educating officers about their legal limits with respect to Fourth Amendment rights and continual reinforcement of proper tactics was thought to have a deterrent effect.

The Petitioner's brief seeks to advance the argument that Detective Fackrell "did not exploit the unlawful detention to search" Mr. Strieff because the warrant was an "intervening circumstance" that Detective Fackrell "did not cause and could not have anticipated." Pet. Merits Brief, p. 4. But the ubiquity of outstanding warrants, particularly in lower-income communities, compels a contrary finding. Using

Ferguson, Missouri as an example, in 2013 the city's municipal court issued over twice as many arrest warrants per capita than any other town in Missouri. *Development in the Law – Policing*, 128 Harv. L. Rev. 1723, 1724 (2015). In discussing local municipal practices of heavy-handed fines on the town's residents with Professor Jelani Cobb, one female resident remarked: "We have people who have warrants because of traffic tickets and they are effectively imprisoned in their homes...[t]hey can't go outside because they'll be arrested." *Id.* at 1724-25. The potential for abuse is worrisome not just for those wanted on minor infractions, but innocent, private persons who expect to be to be free from unreasonable searches and seizures under the Fourth Amendment. Deterrence is the only viable remedy.

This case does not present a situation where the initial illegality was due to a reasonable mistake. [5] On the contrary, it presents a deliberate violation of both the Fourth Amendment and Utah state law. Basic Fourth Amendment principles are well-settled; the Utah Code of Criminal Procedure is almost identical,

---

[5] In *Leon*, the Court remarked that the exclusionary rule is designed to punish unlawful police action, not "objectively reasonable reliance on a subsequently invalidated search warrant." 468 U.S. at 922. *Arizona v. Evans*, 514 U.S. 1, 15-16 (1995), similarly noted that exclusion of evidence due to negligent error on the part of the court's clerk, and not the arresting officer, would not result in deterrence. In both of these cases, the error was made by non-police personnel. While in *Herring*, the Court noted that even police errors that are negligent and non-reckless do not warrant suppression, the case dealt with a recordkeeping error rather than deliberate conduct by the arresting officer, as in this case. *Herring*, 555 U.S. at 146.

providing in pertinent part "a peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions." Utah Code Ann., § 77-7-15 (1999). In *Salt Lake City v. Ray*, 998 P.2d 274, 278 (Utah Ct. App. 2000), the Utah Court of Appeals held that a seizure occurred when officers approached a woman standing in a convenience store parking lot, then retained her identification while running a warrant check. Further, the Utah Supreme Court in 2005 assumed that, during a street encounter, an officer's act of retaining an individual's state identification card to check for warrants is a level-two detention, requiring reasonable suspicion at its inception. *State v. Markland* 112 P.3d 507, 511 (Utah 2005). Reasonable suspicion has been consistently defined as more than an "inchoate and unparticularized suspicion or 'hunch.'" *Terry v. Ohio*, 392 U.S. 1, 27 (1968). *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) cited to *Terry* for the proposition that "[p]eople are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks.

When Detective Fackrell admittedly decided to stop the next person leaving the house he was monitoring, regardless of who that person was, no objective reasonable suspicion existed. J.A. at 17. Fackrell did not see Mr. Strieff enter the house. J.A. at 20. He had never seen Strieff at the house before. J.A. at 20. He did not even know who Strieff was. J.A. at 20. Having no articulable, particularized suspicion that Mr. Strieff was involved in an illegal activity, Detective

Fackrell should not have even demanded his name, address, or explanation of his actions. Further, because Detective Fackrell's interaction with Mr. Strieff that led to the evidence with this case took place in December 2006, he should have been well aware of the settled federal and state jurisprudence affecting his day-to-day interactions with citizens.

Though Petitioner concedes that Detective Fackrell's conduct was indeed a Fourth Amendment violation, Petitioner's articulation of the significance of his illegal conduct misses the mark. Characterization of the illegal seizure of Mr. Strieff as a "stop that turned out to be illegal" ignores that, objectively viewed, a reasonable officer would have known his conduct was unlawful. An 18-year veteran of the police force with significant training and experience should be expected to know whether reasonable suspicion exists. The violation of Respondent's rights was both substantial and deliberate such that deterrence would meaningfully alter behavior in preventing future misconduct.

C. Where The Sole Evidence Of A Previously Uncharged Crime Is A Direct Result Of Police Misconduct, The Cost Of Exclusion Is Negligible.

Deference to the inherent probative value of reliable physical evidence should cease when the benefit afforded to the government in ignoring the law is what should "offend the basic concepts of the criminal justice system." *Leon*, 468 U.S. at 908. Where the interest protected is as fundamental as "the right of the people to be secure in their persons...against

unreasonable searches and seizures..." and the violation is a direct intrusion upon the sanctity of the individual and freedom of movement in public spaces, the Fourth Amendment guarantee would certainly be served by suppression. As one appellate judge has remarked:

> Courts protect Fourth Amendment rights through the exclusionary rule by denying the government the use of evidence obtained as a result of an illegal search or seizure. In turn, government agents should then be deterred from initiating conduct violating the Fourth Amendment, since they would lose the benefit of any evidence they might uncover. The real point, however, is to spare law-abiding citizens that conduct by discouraging law enforcement officers from acting in unconstitutional ways.

State v. Moralez, 242 P.3d 223, (Kan. Ct. App. 2010), (Atcheson, J., dissenting).

By throwing out the evidence Detective Fackrell obtained from Mr. Strieff the courts safeguard the Fourth Amendment with a result that will dissuade police officers from detaining other people (who might be a next door neighbor or a teacher who works at the elementary school around the corner) without a proper legal basis.

Where an officer is tasked with enforcing the law, he is also tasked with upholding laws of the state and of the U.S. Constitution. To excuse the officer's flagrant

violation in this case, in the name of "investigation," does not serve the societal interest in maintaining law and order. Moreover, when the sole physical evidence for an entirely new charge against a suspect would not have been brought to light but-for the illegal conduct of law enforcement, that evidence must be suppressed.

CONCLUSION

This Court should affirm the Utah Supreme Court's ruling that the attenuation doctrine does not apply when there is no separate, cognizable intervening circumstance between an unlawful seizure of a person and a search incident to arrest on an unlawfully discovered valid warrant. While the lawful arrest pursuant to a valid warrant remains untainted, suppression of the physical fruits of police misconduct will result in appreciable deterrence and will ensure that individuals' Fourth Amendment right to be free from unreasonable searches and seizures remains intact.

January 29, 2016

Respectfully submitted,

Norman M. Garland
Counsel of Record
Michael M. Epstein
Amicus Project at Southwestern Law School
3050 Wilshire Blvd.
Los Angeles, CA 90010
(213) 738-6774
amicusproject@swlaw.edu

Supreme Court, U.S.
FILED
DEC 11 2015
OFFICE OF THE CLER

No. 14-1373

In the Supreme Court of the United States

STATE OF UTAH, PETITIONER,

v.

EDWARD JOSEPH STRIEFF, JR., RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND TWENTY-NINE OTHER STATES IN SUPPORT OF PETITIONER

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 241-8403

Kathryn M. Dalzell
Assistant Solicitor General

Attorneys for *Amicus Curiae*
State of Michigan

QUESTION PRESENTED

Whether evidence seized incident to a lawful arrest on an outstanding warrant should be suppressed because the warrant was discovered during an investigatory stop later held to be unlawful.

TABLE OF CONTENTS

Question Presented i

Table of Authorities iii

Interest of *Amici Curiae* and Summary of Argument 1

Argument 2

I. This Court's attenuation cases focus on the police officer's control over the intervening circumstance and on the officer's objective good faith. 2

II. This Court's attenuation principles follow from its exclusionary-rule jurisprudence, including the well-established exception for actions taken in objective good faith. 8

III. Absent flagrant illegality, suppression of evidence seized during execution of a valid arrest warrant will not appreciably deter police misconduct 11

A. The concerns undergirding the minority rule are unfounded 13

B. Any supposed incremental value of the minority rule is outweighed by its great social costs. 16

Conclusion 18

Additional Counsel 19

TABLE OF AUTHORITIES

Cases

Arizona v. *Evans*,
514 U.S. 1 (1995) 11, 13

Brown v. *Illinois*,
422 U.S. 590 (1975) ..... passim

Cox v. *State*,
916 A.2d 311 (Md. 2007) 15

Davis v. *United States*,
131 S. Ct. 2419 (2011) ..... passim

Hardy v. *Commonwealth*,
149 S.W.3d 433 (Ky. App. 2004) 15

Heien v. *North Carolina*,
135 S. Ct. 530 (2014) 10

Herring v. *United States*,
555 U.S. 135 (2009) ..... passim

Hudson v. *Michigan*,
547 U.S. 586 (2006) 13, 14, 16, 17

Jacobs v. *State*,
128 P.3d 1085 (Okla. 2006) 15

Johnson v. *Louisiana*,
406 U.S. 356 (1972) 5

McBath v. *State*,
108 P.3d 241 (Alaska Ct. App. 2005) 15

Michigan v. *Tucker*,
417 U.S. 433 (1974) 10

Missouri v. *Seibert*,
542 U.S. 600 (2004) 6

Oregon v. *Elstad*,
470 U.S. 298 (1985) 6

People v. *Brendlin*,
195 P.3d 1074 (Cal. 2008) 15

People v. *Mitchell*,
824 N.E.2d 642 (Ill. App. 2005)..... 14

People v. *Reese*,
761 N.W.2d 405 (Mich. App. 2008) 15

Quinn v. *State*,
792 N.E.2d 597 (Ind. Ct. App. 2003)..... 15

Segura v. *United States*,
468 U.S. 796 (1984) 13

State v. *Frierson*,
926 So. 2d 1139 (Fla. 2006)..... 15

State v. *Grayson*,
336 S.W.3d 138 (Mo. 2011)..... 14

State v. *Hill*,
725 So. 2d 1282 (La. 1998)..... 15

State v. *Hummons*,
253 P.3d 275 (Ariz. 2011)..... 15

State v. *Mazuca*,
375 S.W.3d 294 (Tex. Crim. App. 2012) 15

State v. *Moralez*,
300 P.3d 1090 (Kan. 2013)..... 16

State v. *Page*,
103 P.3d 454 (Ida. 2004)..... 15

State v. *Shaw*,
64 A.3d 499 (N.J. 2012) 14

State v. *Soto*,
179 P.3d 1239 (N.M. App. 2008) 14

United States v. *Ceccolini*,
435 U.S. 268 (1978) 5

United States v. *Faulkner*,
636 F.3d 1009 (8th Cir. 2011) 15

United States v. *Green*,
111 F.3d 515 (7th Cir. 1997) 15

United States v. *Gross*,
662 F.3d 393 (6th Cir. 2011) 15, 16

United States v. *Leon*,
468 U.S. 897 (1984) ..... passim

United States v. *Simpson*,
439 F.3d 490 (8th Cir. 2006) 15

Wong Sun v. *United States*,
371 U.S. 471 (1963) ..... passim

INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT

As the chief legal officers of their respective states, the State Attorneys General have a vital interest in ensuring that evidence obtained in objective good faith and pursuant to a valid arrest warrant is admissible. In its decision below, the Utah Supreme Court excluded evidence seized incident to a lawful arrest, made under a valid arrest warrant. At no point did the Utah courts question the good faith of the arresting officer or the validity of the warrant. But because the officer discovered the outstanding warrant during a stop that lacked probable cause, the state's highest court held that the evidence must be suppressed. That decision contravenes this Court's exclusionary-rule cases because it ignores that the officer acted in objective good faith and had no control over the intervening circumstance (the existence of a valid arrest warrant).

Most circuits and state high courts recognize that evidence seized incident to a lawful arrest on an outstanding warrant is admissible, as long as the illegality of the initial stop was not flagrant. These courts recognize that police lack control over the intervening circumstance (whether an outstanding warrant exists) and that the exclusionary rule's deterrent purpose is not furthered by excluding such evidence in the absence of sufficiently culpable police conduct.

In contrast, some jurisdictions exclude such evidence, giving little or no weight to the discovery of a valid arrest warrant or to the objective good faith of the officer, resulting in a functionally *per se* rule of

suppression. The Utah Supreme Court adopted a slightly different approach—also resulting in suppression—holding that this Court's attenuation doctrine is limited to voluntary acts of a defendant's free will.

This Court should confirm the majority rule and reaffirm the Court's longstanding jurisprudence that evidence is admissible at trial when it is obtained in objective good faith following an intervening circumstance beyond the officer's control.

ARGUMENT

This Court's exclusionary-rule cases entail that evidence seized during execution of a valid arrest warrant, even if the warrant is discovered during an otherwise unlawful search, is admissible at trial so long as the initial stop was not flagrantly illegal.

I. This Court's attenuation cases focus on the police officer's control over the intervening circumstance and on the officer's objective good faith.

This Court's seminal cases on the attenuation exception to the exclusionary rule focus on (1) the police officer's ability to control the intervening circumstance; and (2) the officer's objective good faith. See *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Brown* v. *Illinois*, 422 U.S. 590 (1975).

In *Wong Sun* v. *United States*, this Court examined statements made by two different defendants and treated them differently based on whether intervening events attenuated their initial illegal arrest. The Court first addressed the admissibility of state-

ments by a defendant, James Wah Toy, after police illegally entered his apartment, chased him into his bedroom, and failed to provide any *Miranda*-style warnings (the case pre-dated *Miranda*). The government had argued that Toy's ensuing statements were intervening acts of Toy's free will that broke the chain of causation from the officers' initial illegal entry. But the Court rejected that argument, explaining that it was "unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion." 371 U.S. at 486. After all, "[s]ix or seven officers had broken the door and followed on Toy's heels into the bedroom where his wife and child were sleeping," and "[h]e had been almost immediately handcuffed and arrested." *Id.* The Court noted that "[i]t is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not." *Id.* at 486 n.12.

In contrast, the Court held that the confession of another defendant in that same case, Wong Sun, *was* admissible under the attenuation exception. The Court first agreed with the lower courts that police had initially arrested Wong Sun without probable cause or reasonable grounds. *Id.* at 491. But the Court held that the confession was admissible because the connection between his arrest and later confession "had become so attenuated as to dissipate the taint." *Id.* That is because Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make his statement. *Id.*

Twelve years later, the Court again addressed the attenuation exception in *Brown* v. *Illinois*, 422 U.S. 590 (1975). In *Brown*, police officers broke into Brown's apartment without a warrant or probable cause and searched it. *Id.* at 592. When Brown later returned home and "was climbing the last of the stairs leading to the rear entrance of his [] apartment," "he happened to glance at the window near the door. He saw, pointed at him through the window, a revolver held by a stranger who was inside the apartment." *Id.* The stranger said, "Don't move, you are under arrest," and another man with a gun came up behind him. *Id.* The strangers took him to the police station, questioning him along the way. *Id.* at 592–94. When they arrived at the station, the strangers, who were police officers, informed Brown of his *Miranda* rights. *Id.* at 594.

The state argued that Brown's subsequent statements were admissible because the intervening *Miranda* warnings broke the chain of causation and sufficiently dissipated the taint of the initial unlawful entry and arrest. *Id.* at 597–600. But the Court rejected the state's argument, highlighting the possibility that the statement could have been "induced by the continuing effects of unconstitutional custody." *Id.* at 597 Indeed, the Court noted that the illegality "had a quality of purposefulness": "The imp[ro]priety of the arrest was obvious"; "awareness of that fact was virtually conceded by the two detectives"; and "[t]he manner in which Brown's arrest was [e]ffected gives the appearance of having been calculated to cause surprise, fright, and confusion." *Id.* at 605.

This Court made clear in *Brown* and *Wong Sun* that it was concerned with: (1) the police officer's ability to control the alleged intervening circumstance (i.e., the giving of *Miranda* warnings, and the degree to which police behavior may have induced the defendant's incriminating statements); and (2) how flagrantly unlawful the officer's conduct was, viewed objectively (e.g., whether the officer acted to exploit the illegality of the initial stop). And these concerns—which focus on the officer's conduct and control, not on whether there is an intervening act of free will by the defendant—also run through this Court's other attenuation cases. See *Johnson* v. *Louisiana*, 406 U.S. 356, 365 (1972) (lineup identification not forbidden fruit of allegedly invalid arrest where lineup followed commitment by independent magistrate); *United States* v. *Ceccolini*, 435 U.S. 268, 279–80 (1978) (live witness testimony not forbidden fruit where officer did not act culpably and where testimony was given of witness's own free will).

The Court expressly rejected the idea that but-for causation is sufficient to require suppression: "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Wong Sun*, 371 U.S. at 487–88. Instead, the focus is on whether the police exploited their own illegal conduct: "[T]he more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at *by exploitation of that illegality* or instead *by means sufficiently distinguishable* to be purged of the primary taint." *Id.* at 487–88 (emphasis added).

Thus, when the Court thought that the statements in *Wong Sun* and *Brown* were not truly voluntary and had instead been induced by the officers' exploiting the initial illegality, it suppressed them. *Wong Sun*, 371 U.S. at 486; *Brown*, 422 U.S. at 597, 605. Cf. *Missouri* v. *Seibert*, 542 U.S. 600, 612–14 (2004) (ordering suppression where police deliberately, in strategy calculated "to undermine the *Miranda* warnings," delayed *Miranda* warnings until after unwarned interrogation had produced a confession). But when a defendant's statement had been truly voluntary, as it was for defendant Wong Sun, *Wong Sun*, 371 U.S. at 491, the Court was satisfied that the statement was not subject to the police officer's control and had not been caused by any culpable conduct by the officer. See also *Oregon* v. *Elstad*, 470 U.S. 298, 309, 313, 315–16 (1985) (suppression not required where pre-*Miranda* discussion "was not to interrogate the suspect," incident had "none of the earmarks of coercion," and officer's initial failure to warn was an "oversight" and not "calculated to undermine the suspect's ability to exercise his free will," making the causal connection between defendant's first and second responses to police "speculative and attenuated"); *Seibert*, 542 U.S. at 614 (distinguishing *Elstad* as involving "good-faith *Miranda* mistake" and "posing no threat to warn-first practice generally").

Justice Powell, in his *Brown* concurrence, clarified the relevance of control and absence of culpability in the Court's attenuation cases. "[R]ecognizing that the deterrent value of the exclusionary rule is limited to certain kinds of police conduct," he suggested dividing cases into categories: at one extreme,

"the flagrantly abusive violation of Fourth Amendment rights," and at the other extreme, merely "technical Fourth Amendment violations." Where "official conduct was flagrantly abusive" he would require "the clearest indication of attenuation"—"some demonstrably effective break in the chain of events leading from the illegal arrest to the statement"—because "[i]n such cases the deterrent value of the exclusionary rule is most likely to be effective, and the corresponding mandate to preserve judicial integrity most clearly demands that the fruits of official misconduct be denied." *Id.* at 610–11 (Powell, J., concurring) (citations omitted). But as to technical violations, "where, for example, officers in good faith arrest an individual . , the deterrence rationale of the exclusionary rule does not obtain," and therefore there is "no legitimate justification for depriving the prosecution of reliable and probative evidence." *Id.* at 610–12 (Powell, J., concurring).

This Court similarly focused on the deterrence rationale in *United States* v. *Leon*, 468 U.S. 897 (1984). The *Leon* Court explained that "*Brown*'s focus on the causal connection between the illegality and the confession reflected the two policies behind the use of the exclusionary rule to effectuate the Fourth Amendment." *Id.* at 911 n.7 (quotation marks omitted). "Where there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts." *Id.* (quotation marks omitted).

Consistent with this focus on deterrence, the Court emphasized in its attenuation cases the importance of assessing the officer's control and culpability on a case-by-case basis: "[T]he *Miranda* warnings, alone and *per se*, cannot always make the act sufficiently a product of free will [to break] the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited." *Brown*, 422 U.S. at 603. But while the Court rejected a *per se* rule that *Miranda* warnings *always* break the chain of causation, it also rejected "any alternative *per se* or 'but for' rule" that the chain is *never* broken. *Id.* "The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case." *Id.* The Court considered other circumstances that would be of relevance in cases that, like *Brown* and *Wong Sun*, address the voluntariness of a defendant's statement in light of potential coercive police behavior, including the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Id.* at 603–04.

II. This Court's attenuation principles follow from its exclusionary-rule jurisprudence, including the well-established exception for actions taken in objective good faith.

By assessing the officer's ability to control the intervening circumstance and his or her culpability, the Court's reasoning in *Brown* and *Wong Sun* aligns with its exclusionary-rule jurisprudence more broadly—and in particular, with the well-established exception for errors made in objective good faith.

The sole purpose of the exclusionary rule is to deter misconduct by law enforcement. *Davis* v. *United States*, 131 S. Ct. 2419, 2426–27, 2432 (2011). Exclusion is not constitutionally mandated and is not an individual right of criminal defendants. *Herring* v. *United States*, 555 U.S. 135, 141 (2009). This Court has thus repeatedly reminded courts to apply the exclusionary rule *only* when application will further the rule's deterrence purpose. E.g., *id.*; *Davis*, 131 S. Ct. at 2426–27; *Leon*, 468 U.S. at 907–08. And the deterrence benefits of suppression must outweigh its heavy costs—namely, the exclusion of relevant evidence of guilt and "letting guilty and possibly dangerous defendants go free—something that offends basic concepts of the criminal justice system." *Herring*, 555 U.S. at 141.

As this Court has recognized, "the deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue." *Davis*, 131 S. Ct. at 2427. Exclusion is warranted only when the police conduct is "deliberate enough to yield meaningful deterrence, and culpable enough to be worth the price paid by the justice system." *Id.* at 2428 (quotation marks and citation omitted). "When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Id.* at 2427. "Indeed, the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional." *Herring*, 555 US at 143. But "when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence ra-

tionale loses much of its force, and exclusion cannot pay its way." *Id.* at 2427–28 (citations and quotation marks omitted).

Because the deterrence benefits of targeting non-flagrant police behavior are so low, this Court has long applied an objective good-faith exception to the exclusionary rule. See, e.g., *Leon*, 468 U.S. at 907–08 ("Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system."); *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974) (noting that when a police officer acts in complete good faith, the deterrence rationale for suppression loses much of its force); *Herring*, 555 U.S. at 142 (detailing the development of the good-faith exception); *Davis*, 131 S. Ct. at 2428 (same). Thus, the good-faith exception both allows evidence to be admitted and protects officers from civil liability via qualified immunity. *Heien* v. *North Carolina*, 135 S. Ct. 530, 539 (2014) (collecting cases).

Relatedly, this Court has routinely declined to apply the exclusionary rule when suppression would have no deterrent effect because the police officer lacks control over the relevant circumstances. As but one example, this Court declined to apply the exclusionary rule when police carry out a search in objectively reasonable reliance on a warrant later held invalid. *Leon*, 468 U.S. at 913, 922. The Court explained that "[t]he error in such a case rests with the issuing magistrate, not the police officer, and punishing the errors of judges is not the office of the exclu-

sionary rule." *Davis*, 131 S. Ct. at 2428 (quotations and citations omitted) (discussing *Leon*). Cf. *Leon*, 468 U.S. at 912–13 (noting that "no Fourth Amendment decision marking a 'clear break with the past' has been applied retroactively"); *Arizona* v. *Evans*, 514 U.S. 1, 14 (1995) (applying good-faith exception where police reasonably rely on erroneous information concerning an arrest warrant in a database maintained by judicial employees); *Herring*, 555 U.S. at 146–47 (applying good-faith exception where police reasonably relied on erroneous information from other police employees).

The Court's attenuation decisions in *Brown* and *Wong Sun* thus align logically with this Court's broader exclusionary-rule jurisprudence. The Court excluded evidence in *Brown* and *Wong Sun* when the police exercised control over the intervening circumstance and when they acted culpably. But when the officers proceeded in objective good faith or the intervening circumstance was beyond their control, the Court allowed the evidence.

III. Absent flagrant illegality, suppression of evidence seized during execution of a valid arrest warrant will not appreciably deter police misconduct.

The majority rule in outstanding arrest-warrant cases aligns logically with this Court's precedent. First, those courts recognize that police lack control over the intervening circumstance—*i.e.*, whether an outstanding arrest warrant exists. To the extent such a warrant exists, it was issued independently in the past by a neutral magistrate after a determination that probable cause supports arrest. It does not

exist because of anything the arresting officer did or did not do. Second, the majority rule deters misconduct of the type targeted by this Court's exclusionary rule jurisprudence by ordering suppression if the illegality of the initial stop was flagrant.

The majority rule also more faithfully executes this Court's directive that suppression be ordered only on a case-by-case basis. *Brown*, 422 U.S. at 603–04; see also *Leon*, 468 U.S. at 918 ("[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.").

In contrast, the minority rule contravenes this Court's jurisprudence because it ignores both police control (or lack of it) over the intervening circumstance and objective good faith. This case is a prime example. The Utah courts at no point suggested that Detective Fackrell acted with any culpability beyond, at most, isolated negligence—not even if one looked at it (improperly) by a subjective standard. See Pet. App. at 70 ("There is no indication in the record that the officer stopped Strieff with the purpose of checking for outstanding warrants, and the district court found that he did not target Strieff in knowing or obvious disregard of constitutional limitations."); Pet. App. at 1 (raising no disagreement). Further, it is evident that Detective Fackrell had no control over whether there was a warrant out for Strieff's arrest. Suppression is unjustified under those circumstances.

In effect, the minority rule leads courts to order suppression regardless of the culpability of the police

conduct, and regardless of the officers' ability to control the intervening circumstance. Cf., e.g., *Brown*, 422 U.S. at 603–05; *Wong Sun*, 371 U.S. at 486–88; *Leon*, 468 U.S. at 907–08, 912–13, 922; *Davis*, 131 S. Ct. at 2427–28; *Herring*, 555 U.S. at 137, 143; *Evans*, 514 U.S. at 14. The minority rule also contravenes this Court's requirement of case-by-case assessment by imposing a *de facto* rule of suppression. Cf. *Brown*, 422 U.S. at 603–04; *Leon*, 468 U.S. at 918.

A. The concerns undergirding the minority rule are unfounded.

Moreover, the concerns that led to the minority rule are unfounded, and analogous concerns have been rejected by this Court.

First, the majority rule does not encourage dragnet-style suspicionless stops. "[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act." *Hudson* v. *Michigan*, 547 U.S. 586, 596 (2006). Here, the incentive is low.

As an initial matter, seizing an individual without probable cause or reasonable suspicion is illegal. This Court has stated that it is "unwilling to believe that officers will routinely and purposely violate the law as a matter of course." *Segura* v. *United States*, 468 U.S. 796, 812 (1984).

The majority rule itself also deters suspicionless stops by threatening exclusion for flagrantly illegal behavior. That is, if the officer has no objective reason for the stop other than to check for outstanding arrest warrants, the evidence will be suppressed. See, e.g., *State* v. *Grayson*, 336 S.W.3d 138, 148 (Mo.

2011) (en banc) (ordering suppression where officer knew detainee, "knew that a lot of times there were warrants for him," and stop was nothing more than "fishing expedition"); *State* v. *Shaw*, 64 A.3d 499, 512 (N.J. 2012) (affirming suppression where stop was "random detention of an individual for the purpose of running a warrant check"); *People* v. *Mitchell*, 824 N.E.2d 642, 650 (Ill. App. 2005) (affirming suppression where "the sole apparent purpose of the detention [wa]s to check for a warrant"); *State* v. *Soto*, 179 P.3d 1239, 1245 (N.M. App. 2008) (affirming suppression where officers stopped defendant based on "vague notion that they would obtain [his] personal information"), *cert. quashed*, 214 P.3d 793 (N.M. 2009). Knowing this, police officers are not motivated to make illegal stops.

Even setting aside the question of incentive levels for misconduct, this Court has been reluctant to indulge the specter of systemic misconduct without any evidence that a feared police tactic is actually occurring. In *Herring*, for example, this Court held unfounded "Petitioner's fears that our decision will cause police departments to deliberately keep their officers ignorant". "[T]here is no evidence that errors in Dale County's system are routine or widespread. . . Because no such showings were made here, the Eleventh Circuit was correct to affirm the denial of the motion to suppress." 555 U.S. at 146–47. The Court explained that "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified[.]" *Id.*; cf. *Hudson*, 547 U.S. at 604 (Kennedy, J., concurring) ("Today's decision does

not address any demonstrated pattern of knock-and-announce violations. If a widespread pattern of violations were shown, and particularly if those violations were committed against persons who lacked the means or voice to mount an effective protest, there would be reason for grave concern.").

Here, no evidence has been presented that police are routinely and systematically stopping people without reasonable suspicion or probable cause, solely to check for outstanding warrants. Indeed, the vast bulk of intervening-warrant attenuation cases do not suggest bad faith. See, e.g., *United States* v. *Faulkner*, 636 F.3d 1009, 1017 (8th Cir. 2011); *United States* v. *Gross*, 662 F.3d 393, 406 (6th Cir. 2011); *United States* v. *Simpson*, 439 F.3d 490, 496 (8th Cir. 2006); *United States* v. *Green*, 111 F.3d 515, 523 (7th Cir. 1997); *State* v. *Hummons*, 253 P.3d 275, 279 (Ariz. 2011); *People* v. *Brendlin*, 195 P.3d 1074, 1080 (Cal. 2008); *Cox* v. *State*, 916 A.2d 311, 323 (Md. 2007); *Jacobs* v. *State*, 128 P.3d 1085, 1089 (Okla. 2006); *State* v. *Frierson*, 926 So. 2d 1139, 1145 (Fla. 2006); *State* v. *Page*, 103 P.3d 454, 459 (Ida. 2004); *State* v. *Hill*, 725 So. 2d 1282, 1287 (La. 1998); *State* v. *Mazuca*, 375 S.W.3d 294, 309 (Tex. Crim. App. 2012); *People* v. *Reese*, 761 N.W.2d 405, 413 (Mich. App. 2008); *McBath* v. *State*, 108 P.3d 241, 250 (Alaska Ct. App. 2005); *Hardy* v. *Commonwealth*, 149 S.W.3d 433, 436 (Ky. App. 2004); *Quinn* v. *State*, 792 N.E.2d 597, 602 (Ind. Ct. App. 2003).

Second, any fears of "recurring or systemic negligence" would be misplaced here. *Davis*, 131 S. Ct. at 2428–29 ("Unless the exclusionary rule is to become a strict-liability regime, it can have no application in

a case that does not involve any recurring or systemic negligence on the part of law enforcement and in which law enforcement officers did not violate a defendant's Fourth Amendment rights deliberately, recklessly, or with gross negligence." (quotation marks omitted)). Indeed, negligence is not what the minority jurisdictions are concerned about. Instead, they are concerned about police officers employing dragnet-style stops solely to conduct warrant checks. See, e.g., *Gross*, 662 F.3d at 404–05; *State* v. *Moralez*, 300 P.3d 1090, 1102 (Kan. 2013). As addressed above, that concern is negated through several different mechanisms, including the rule itself.

B. Any supposed incremental value of the minority rule is outweighed by its great social costs.

The fact that the minority rule provides little, if any, incremental deterrence puts it at odds with this Court's precedent. "Quite apart" from issues of causation, "the exclusionary rule has never been applied *except* where its deterrence benefits outweigh its substantial social costs." *Hudson*, 547 U.S. at 594 (quotation marks omitted) (emphasis added).

Just some deterrence value is not enough. *Id.* at 2427. "[M]arginal" or incremental deterrence will not justify "the substantial costs of exclusion." *Herring*, 555 US at 146. That is because suppression "exacts a heavy toll on both the judicial system and society at large." *Davis*, 131 S. Ct. at 2426–27. That is, it requires courts to ignore reliable, trustworthy evidence bearing on guilt and potentially to set criminals loose in the community without punishment. *Id.* Exclusion is thus a "bitter pill" that society must swallow only

as a "last resort" when the benefits of suppression outweigh its heavy costs. *Id.*; see also *Hudson*, 547 U.S. at 591. The burden is on those urging its application to show that application in a particular setting meets this test. *Hudson*, 547 U.S. at 591.

"Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." *Leon*, 468 U.S. at 907–08. In that instance, "[i]ndiscriminate application of the exclusionary rule . . may well generate disrespect for the law and administration of justice." *Id.*

Such is the case here. At worst, Detective Fackrell's conduct involved "only simple, isolated negligence," *Davis*, 131 S. Ct. at 2427–28, and he lacked control over the existence of Strieff's outstanding arrest warrant. "An error that arises from nonrecurring and attenuated negligence is [] far removed from the core concerns that led [this Court] to adopt the [exclusionary] rule in the first place." *Id.* at 144. This Court should reverse the judgment of the Utah Supreme Court and hold that absent flagrant police misconduct, the discovery of an outstanding arrest warrant attenuates any taint from an initial unlawful stop.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the Utah Supreme Court.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Kathryn M. Dalzell
Assistant Solicitor General

Attorneys for *Amicus Curiae*
State of Michigan

Dated: DECEMBER 2015

ADDITIONAL COUNSEL

Luther Strange
Attorney General
State of Alabama
501 Washington Ave.
Montgomery, AL 36130

Mark Brnovich
Attorney General
State of Arizona
1275 W. Washington
Phoenix, AZ 85007

Leslie Rutledge
Attorney General
State of Arkansas
323 Center St, Ste. 200
Little Rock, AR 72201

Cynthia Coffman
Attorney General
State of Colorado
1300 Broadway, 10th Fl
Denver, CO 80203

Pamela Jo Bondi
Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, FL 32399

Douglas S. Chin
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

Lisa Madigan
Attorney General
State of Illinois
100 W Randolph St.
12th Floor
Chicago, IL 60601

Gregory F. Zoeller
Attorney General
State of Indiana
302 W. Washington St.
IGC-South, Fifth Fl.
Indianapolis, IN 46204

Derek Schmidt
Attorney General
State of Kansas
120 S.W. 10th Ave.
2nd Floor
Topeka, KS 66612

Jack Conway
Attorney General
Commonwealth of
Kentucky
700 Capital Ave.
Ste. 118
Frankfort, KY 40601

James D. "Buddy" Caldwell
Attorney General
State of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

Janet T. Mills
Attorney General
State of Maine
Six State House Station
Augusta, ME 04333

Douglas F. Gansler
Attorney General
State of Maryland
200 St. Paul Pl., 20th Fl
Baltimore, MD 21202

Timothy C. Fox
Attorney General
State of Montana
P.O. Box 201401
Helena, MT 59620-1404

Douglas J. Peterson
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, NE 68509

John J. Hoffman
Acting Attorney
General
State of New Jersey
P.O. Box 080
Trenton, NJ 08625

Adam Paul Laxalt
Attorney General
State of Nevada
100 North Carson St.
Carson City, NV 89701

Wayne Stenehjem
Attorney General
State of North Dakota
600 E. Boulevard Ave.
Bismarck, ND 58505

Michael DeWine
Attorney General
State of Ohio
30 E. Broad St., 17th Fl
Columbus, OH 43215

Ellen F. Rosenblum
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301

E. Scott Pruitt
Attorney General
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK
73105

Bruce R. Beemer
First Deputy Attorney
General
Commonwealth of
Pennsylvania
16th Fl, Strawberry Sq.
Harrisburg, PA 17120

Peter F. Kilmartin
Attorney General
State of Rhode Island
150 S. Main St.
Providence, RI 02903

Alan Wilson
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211

Marty J. Jackley
Attorney General
State of South Dakota
1302 E. Highway 14
Suite 1
Pierre, SD 57501-8501

Herbert Slatery III
Attorney General and
Reporter of Tennessee
425 5th Ave. N.
Nashville, TN 37243

Ken Paxton
Attorney General
State of Texas
P.O. Box 12548
Austin, TX 78711-2548

Patrick Morrisey
Attorney General
State of West Virginia
State Capitol, Rm 26-E
Charleston, WV 25305

Peter K. Michael
Attorney General
State of Wyoming
123 Capitol Building
Cheyenne, WY 82002